16-437

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 121.

JOHN W. MINTURN, ROBERT B. MINTURN, JR., W. H. SWAN, ELIAS WADE, JR., JOHN [redacted] W. AHMAN, SURVIVORS, &c., AND R. M. CLARK, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1879.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between the United States and John W. Minturn, Robert B. Minturn, junior, W. H. Swan, Elias Wade, junior, John W. Ahman, survivors, &c., and R. M. Clark, a manifest error hath happened to the great damage of the said John W. Minturn, Robert B. Minturn, junior, W. H. Swan, Elias Wade, junior, John W. Ahman, survivors, &c., and R. M. Clark, as is said, and as appears by their complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fourth Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 11th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

Let this writ issue.
Oct. 11, 1879.

SAM'L BLATCHFORD, *C. J.*

2 (Indorsed:) A. 250. U. S. Supreme Court. John W. Minturn et al., plaintiffs in error, against The United States, defendants in error. Writ of error. Evarts, Southmayd & Choate, att'ys for plaintiffs in error, 52 Wall st., New York City.

Due & timely service of a copy of within writ of error is hereby admitted.

New York, October 13th, 1879.

STEWART L. WOODFORD,
U. S. Attorney.

W.

U. S. circuit court, filed Oct. 13, 1879. John I. Davenport, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of

America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to ninety-three
3 inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of John W. Minturn, Robert B. Minturn, junior, W. H. Swan, Elias Wade, junior, John W. Ahman, survivors, &c., and R. M. Clark, plaintiffs in error, against The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York in the southern district of New York, in the second circuit, this twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT.

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, 1879, to wit, of the 11th day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Witness, the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the third day of September, 1868, in April term of the same year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came the United States of America, by S. G. Courtney, their attorney, and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against John W. Minturn, Robert B. Minturn, jr., William H. Swan, Elias Wade, jr., John W. Ahman, and R. M. Clark, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 Circuit court of the United States of America for the southern district of New York, in the second circuit, of the second day of September, and yet of April term, in the year of our Lord one thousand eight hundred and sixty-eight.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The United States of America, plaintiff in this suit, by Samuel G. Courtney, their attorney for the said southern district of New York, complain of John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, survivors of the late firm of Grinnell, Minturn and

Company, and R. M. Clark, defendants in this suit, the said defendants John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, and R. M. Clark, being in custody, &c., of a plea
6 that the said defendants render unto the said plaintiffs the sum of forty-seven thousand five hundred and seventy-five dollars ninety-eight cents, lawful money of the United States of America, which the said defendants to the said plaintiffs owe and from them unjustly detain, debt on bond. For that whereas the said defendants heretofore, to wit, on the second day of August, in the year of our Lord one thousand eight hundred and sixty-five, at the city of New York, to wit, at the southern district of New York aforesaid, and within the jurisdiction of this court, by a certain bond or writing obligatory, bearing date the day and year last aforesaid, sealed with the seals of the said defendants, which said bond or writing obligatory the said plaintiffs now here bring into court and show to the said court, the said defendants John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., and John W. Ah-
7 man as principals, and the said defendant R. M. Clark as surety, became held and firmly bound unto the said plaintiffs, in the sum of forty-seven thousand five hundred and seventy-five dollars and ninety-eight cents, for the payment whereof to the said plaintiffs the said defendants bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by those presents.

And the plaintiffs aver that on the day and year last aforesaid, and at the place and within the jurisdiction aforesaid, the said defendants, John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., and John W. Ahman, together with one Robert B. Minturn, at the time of the commencement of this suit deceased, were copartners in trade, under the name, style, and firm of Grinnell, Minturn and Company.

And the said plaintiffs further say that the said bond or writing obligatory was and is subject to a certain condition thereunder writ-
8 ten, to the effect following, that is to say, that if the above bounden principals (the said defendants John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, together with said Robert B. Minturn, deceased, meaning) or either of them, or either of their heirs, executors, administrators, or assigns, should on or before the expiration of one year from the date of the importation of the goods, wares, and merchandise thereinafter mentioned, withdraw the said goods, wares, and merchandise in the mode prescribed by law from the public store or bonded warehouse where they might be deposited at the port of New York, and well and truly pay unto the collector of customs of the said United States for the said port the sum of twenty-three thousand seven hundred and eighty-seven $\frac{99}{100}$ dollars, or the true amount when as-
9 certained of the duties imposed by laws then existing or to be thereafter enacted, upon the said goods, wares, and merchandise, the same having been imported by them in the bark Ocean Home, Nickerson, master, from Caikarien, and consisting of various marks, five hundred and eighty packages sugar, or should after the expiration of one year, and before the expiration of three years from the date aforesaid, so withdraw the same and pay to the said collector the sum aforesaid, or the true amount when ascertained of duties imposed by such laws thereon; and also pay an additional sum or duty of ten per centum of the said duties, or should, in the

mode prescribed by law, on or before the expiration of three years from the said date, withdraw the same and actually export them beyond the limits of the United States, or transport them in bond to a port
10 of the Pacific or western coast of the United States, under such regulations as the Secretary of the Treasury might from time to time prescribe, then that obligation was to be void; else it should be and remain in full force and virtue.

And the said plaintiffs aver, as a breach of the condition of the said bond or writing obligatory, though the said time of one year in the condition of the said bond or writing obligatory mentioned has long since expired, that they, the said defendants, John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, and R. M. Clark, or any or either of them, or any one on their behalf at the city of New York, to wit, at the southern district of New York aforesaid, and within the jurisdiction of this court, did not, within the said time of one year from the date of the importation of the said goods, wares, and merchandise, to wit, the said various marks five hundred & eighty p'k'gs
11 sugar, withdraw the said goods, wares, and merchandise in the mode prescribed by law from the public store or bonded warehouse where they were deposited at the port of New York, and did not well and truly pay unto the collector of customs of the said United States for the said port the sum of twenty-three thousand seven hundred and eighty-seven $\frac{99}{100}$ dollars, or the true amount, when ascertained, of the duties imposed by laws then existing, or thereafter enacted, upon the goods, wares, and merchandise, to wit, the goods, wares, and merchandise imported by them in the bark Ocean Home, Nickerson, master, from Caikirien, and consisting of various marks, five hundred & eighty p'k'gs sugar. Nor did they, the said defendants, nor any one acting in their behalf, after the expiration of one year, nor before the expiration of
12 three years, from the date aforesaid, so withdraw the same and pay to the said collector the sum aforesaid, or the true amount when ascertained, of the duties imposed by such laws thereon, and also pay an additional sum or duty equal to ten per centum of said duties; nor did, in the mode prescribed by law, on or before the expiration of three years from the said date withdraw the same and actually export them beyond the limits of the United States, or tranship them in bond to a port of the Pacific or western coast of the United States, under such regulations as the Secretary of the Treasury did from time to time prescribe; but so to do have wholly neglected and refused, and still do neglect and refuse, to wit, at the southern district of New York aforesaid, by means of which said several premises an action hath accrued to the said plaintiffs
13 to have and demand from the said defendants the said sum of money above demanded, together with their damages, by reason of the aforesaid unjust detention thereof, to forty-seven thousand five hundred and seventy-five dollars and ninety-eight cents, and therefore they, the said plaintiffs, bring suit, etc.

S. G. COURTNEY,
U. S. Attorney.

(Endorsed:) U. S. circuit court. The United States of America vs. John W. Minturn, Robert Minturn, jr., W. H. Swan, Elias Wade, jr.,

John W. Ahman, and R. M. Clark. Declaration. Sam'l G. Courtney, U. S. district att'y.

14 Please take notice that a rule has been entered in this cause with the clerk of this court, at his office in the city of New York, requiring the defendants to plead to the declaration filed in this cause, and of which the within is a copy, within twenty days after service of a copy thereof, and notice of said rule or judgment.

Dated Sept. 3d, 1868.

Yours, &c.,

S. G. COURTNEY,
U. S. District Attorney.

To EVARTS, SOUTHMAYD & CHOATE,
Defendants' Attorneys.

Due service of the declaration and rule to plead, of which the within is a copy, is hereby admitted this day of Sept., 1868.

Att'ys for Def'ts.

15 In the circuit court of the United States for the southern district of New York.

JOHN W. MINTURN, ROBERT B. MINTURN, junior, WILLIAM H. SWAN, ELIAS WADE, junior, and JOHN N. AHMAN, survivors of the late firm of Grinnell, Minturn & Co., and R. M. Clark, *ads.*
THE UNITED STATES OF AMERICA.

And the said defendants, John W. Minturn, Robert B. Minturn, junior, William H. Swan, Elias Wade, junior, John N. Ahman, survivors as aforesaid, and R. M. Clark, defendants in this action, by Evarts, Southmayd & Choate, their attorneys, come and defend the wrong and injury, when, &c., and say that the supposed writing obligatory in the declaration mentioned is not their deed, and of this they put themselves upon the country, and the said plaintiffs do the like, &c.

16 And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say, that after the making of the said bond or writing obligatory in the declaration mentioned, and before the expiration of one year from the date of the importation of the goods, wares, and merchandise therein mentioned, to wit, on the thirtieth day of September, eighteen hundred and sixty-five, at the city of New York, and within the southern district of New York, the principals in the said bond, viz, the defendants, John W. Minturn, Robert B. Minturn, junior, William H. Swan, Elias Wade, junior, and John N. Ahman, together with Robert B. Minturn, deceased, by themselves and their assigns, did withdraw the said goods,

17 wares, and merchandise, in the mode prescribed by law from the bonded warehouse where the same were deposited at the port of New York, and did well and truly pay unto the collector of the customs

of the United States for the said port the true amount of all the duties imposed by the laws existing at the time of the making of the said bond or writing obligatory, or thereafter enacted upon the said goods, wares, and merchandise, that is to say, the sum of twenty-three thousand seven hundred and eighty-seven dollars and ninety-nine cents, and this the said defendants are ready to verify. Wherefore they pray judgment whether the plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

EVARTS, SOUTHMAYD & CHOATE,
Defendants' Attorneys.

I, Charles F. Southmayd, a counsellor of this court, do certify
18 that, in my opinion, the foregoing special plea is well founded.
CHARLES F. SOUTHMAYD.

SIR: Please take notice that under the plea of non est factum above pleaded, the defendants will give in evidence in bar of the plaintiffs recovery against them, that after the making of the bond or writing obligatory in the declaration mentioned, and on or about the 8th day of August, 1865, the principals in the said bond, viz, the firm of Grinnell, Minturn & Co. bargained and sold the goods, wares, and merchandise, the duties whereon where secured by the said bond, viz, the five hundred and eighty packages of sugar in the declaration mentioned, to certain persons trading as merchants at Cincinnati, Ohio, under the firm name of Gibson, Early & Co., subject to the payment by said Gibson, Early & Co. of the duties payable to the United States thereon, the payment of which duties was
19 assumed by said Gibson, Early & Co. as part of the price of said merchandise, and thereupon Grinnell, Minturn, & Co. made delivery to Gibson, Early & Co. of said merchandise, in bond, subject to the said duties of giving to said Gibson, Early & Co. a consent in writing, agreeable to the law and usage in such cases, authorizing and empowering said Gibson, Early Co. to make a withdrawal entry of the said merchandise, and receive the same from the bonded warehouse where the same was stored in the legal custody of the United States, and subject to their lien thereon for the duties upon payment to the United States of the duties thereon in exoneration of Grinnell, Minturn & Co's liability for such duties, and only upon condition of such payment and exoneration; of all which premises the United States, through the collector and other proper
20 officers of the customs, had due notice and knowledge; and that the United States, with such full notice and knowledge, did permit the said Gibson, Early & Co. and their assigns, to withdraw from warehous, and receive from the bonded warehouse, where the same were stored as aforesaid, the said merchandise, did deliver, or cause to be delivered, to said Gibson, Early & Co., & their assigns, the whole of said merchandise, and released and gave up the possession thereof and the lien of the United States thereon for the duties, receiving from said Gibson, Early & Co., and their assigns, on account of such duties, the sum of twenty-two thousand two hundred and eighty-one dollars, and as to the residue of such duties, viz, the sum of fifteen hundred and six dollars and ninety-nine cents, voluntarily omitting to demand or exact the same, and that they did so with full knowledge and notice that under and by reason of the circumstances afore-

said, the said merchandise in the hands of Gibson, Early & Co., and their assigns, had become as between them and Grinnell, Minturn & Co., the primary fund for the payment of said duties, and that Grinnell, Minturn & Co., as between them and the parties aforesaid, stood merely as sureties for said duties, and with further notice and knowledge that Grinnell, Minturn & Co., as original importers of said merchandise, had never consented to or authorized the withdrawal of said merchandise from the legal custody of the United States by Gibson, Early & Co., or their assigns, save upon condition of full payment of the duties thereon in their exoneration as aforesaid, and that at the time when the United States so permitted the withdrawal of said merchandise and relinquished their possession and lien as aforesaid, and at all times from the time of the giving of the bond aforesaid, the said merchandise was full and ample security for the amount of the said duties thereon, that is to say, the value thereof was about three times the amount of the duty, of all which premises the plaintiffs had due notice, and that Grinnell, Minturn & Co. had no notice, knowledge, or suspicion that said merchandise had been withdrawn without full payment of the duty, or that said bond had not been fully paid and satisfied until the month of December, 1867, by means of which premises these defendants became and were and are legally discharged from their liability upon the bond aforesaid. And these defendants will further give in evidence that in August and September, 1865, Gibson, Early & Co. bargained and sold a portion of said merchandise, that is to say, three hundred and seventy-five hogsheads and fifty-seven tierces of said sugar to the firm of Wylie & Wade, subject to the duties thereon, the payment of which duties was assumed by Wylie & Wade as part of the price of said merchandise, and Gibson, Early & Co. thereupon made delivery of said merchandise to Wylie & Wade in bond by giving to them a consent to withdraw the same from warehouse and to receive the same from the bonded warehouse, where the same was stored, upon payment by said Wylie & Wade to the United States of the duties thereon and not otherwise; that the short payment of duties to the extent of fifteen hundred and six dollars and ninety-nine cents, hereinbefore mentioned, occurred upon occasion of the withdrawal of this merchandise by Wylie & Wade as the assignees of Gibson, Early & Co., as aforesaid, and such withdrawal and short payment, and the receipt of such merchandise by Wylie & Wade, and the relinquishment of the plaintiff's possession and lien for the duties, as aforesaid, were permitted by the plaintiffs, with full knowledge and notice on their part of all the matters hereinbefore stated, and in disregard, and in violation of the conditions upon which alone Gibson, Early & Co. had authorized Wylie & Wade to withdraw or receive said merchandise, and that Wylie & Wade became and were wholly insolvent before either Gibson, Early & Co. or Grinnell, Minturn & Co. had any notice, knowledge, or suspicion of such withdrawal of said merchandise upon short payment of the duties, and they have so ever since contioued.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Def'ts.

To SAMUEL G. COURTNEY,
U. S. Att'y:

(Endorsed:) U. S. district court, south. dist. of New York.
25 John W. Minturn & others ad's The United States. Plea & notice.
Evarts, Southmayd & Choate, att'ys.

To SAMUEL G. COURTNEY,
U. S. Dist. Att'y:

Please take notice that the within is a copy of the plea and notice this day filed in the office of the clerk of this court.

New York, Nov. 4, 1868.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Def'ts' Att'ys.

Received U. S. attorney's office Nov. 4, 1868.

26 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held in the United States court-rooms, in the city of New York, on the seventeenth day of May, 1872.

Present, Hon. William D. Shipman, circuit judge.

THE UNITED STATES
vs.
JOHN W. MINTURN ET AL.

The issues of fact in this case having been tried by the court without the intervention of a jury, upon the stipulation of the parties in writing filed with the clerk of the court, the court finds and determines the facts to be as follows:

FINDINGS OF FACT.

27 First. That on the second day of August, 1865, the defendants composing the firm of Grinnell, Minturn & Co., being the owners of certain sugars imported from Carbarian by the barque Ocean Home, viz: two hundred and forty-five hogsheads and thirty tierces marked J. M. R.; one hundred and ninety-seven hogsheads and one tierce marked La Fe; forty-eight hogsheads marked Santa Rosalia, and thirty-three hogsheads and twenty-six tierces marked A. M., entered the same at the custom-house in New York by a regular warehouse entry; and thereupon, on the same day, they, as principals, and the said defendant R. M. Clark as surety, executed under their respective hands and seals, and delivered to the collector the warehouse bond, No. 3829, being the bond mentioned in plaintiffs' declaration, and on which this suit is brought, of which a copy is hereto annexed marked Exhibit A, for the purpose therein mentioned,
28 and the said sugars were discharged from said vessel and went into public store, and into the custody of the collector as provided by the acts of Congress relating to warehousing of imported goods.

Second. That afterwards, and on or about the eighth day of August, 1865, said Grinnell, Minturn & Co. bargained and sold to Gibson, Early & Co., merchants of Cincinnati, Ohio, the whole of the said five hundred and eighty packages of sugar, the same being then still in warehouse, and held by the

collector for duties under the acts relating to the warehousing of imported goods, and that by the terms of said sale the same were sold expressly subject to the payment of all duties thereon by said Gibson, Early & Co., who, as part of the agreed price of said goods on said sale, assumed
29 the payment of said duties, the price less the duties so assumed being payable in cash on delivery, and being so paid accordingly.

That thereupon, in consummation of said sale, said Grinnell, Minturn & Co. made delivery of said goods in bond subject to said duties by writing at the foot of the said warehouse entry a consent for the withdrawal of said goods from warehouse by said purchasers, as follows:

"AUGUST 9TH, 1865.

"We hereby authorize Mess. Gibson, Early & Co. to withdraw the sugars described in this entry.

(Signed) "GRINNELL, MINTURN & CO."

It was not the custom to give any formal notice to the collector or any other officer of the customs of such sales in bond, nor was any such notice given in this case. The authority to withdraw in the form above stated would be and was presented to the collector in due course before the withdrawal could be made by the vendee.

30 Third. That the weights of said several lots of sugars as returned by the official United States weighers of the same were as follows:

J. M. R.	245 hhds	312,867	lbs.
"	30 tierces	20,367	"
La Fe	187 hhds	286,857	"
"	1 tierce	648	"
Santa Rosalia	48 hhds	68,614	"
A. M.	33 "	47,306	"
"	26 tierces	19,142	"
Total weight		755,621	pounds;

upon which the duty at three cents per pound, the rate fixed thereon by law, was liquidated by the collector at $22,668.63.

Fourth. That afterwards and on the eleventh day of August, 1865, said Gibson, Early & Co. entered to be withdrawn and to be transported to Cincinnati, a portion of said sugars, as follows: J. M. R. 232 hogsheads; La Fe, 18 do., weighing 325,011 lbs., and the duties thereon were duly paid, amounting to $9,750.33.

31 That afterwards and on the twenty-ninth day of August, said Gibson, Early & Co. withdrew for consumption another portion of said sugar, as follows, 48 hogsheads Santa Rosalia, weighing 48,618 pounds, and the duties thereon were duly paid, amounting to $2,058.42.

Each of the said withdrawals was made under the authority of Grinnell Minturn & Co., as set forth in the second paragraph of this finding of facts.

Fifth. That afterwards and before the fourth day of September, 1865, Gibson, Early & Co. sold in bond to Hugh N. Camp, a sugar refiner in

New York, the residue of said sugars, the same being then in warehouse and held by the collector for duties under the acts of Congress relating to the warehousing of imported goods, and that by the terms of said sale the same were sold in bond expressly subject to the payment of all
32 duties thereon by said purchaser, who, as part of the agreed price of said goods on said sale, assumed the payment of said duties. That Wylie and Wade, custom-house brokers, were employed by said purchaser, Camp, to withdraw the said sugars so purchased by him and to pay the duties thereon, and for that purpose were furnished by him with the amount of said duties, viz, $10,859.58 in gold. And thereupon and on said fourth day of September, 1865, in consumation of said sale, said Gibson, Early & Co. made delivery of the residue of said sugars in bond to the said purchaser, Hugh N. Camp, by writing at the foot of the withdrawal entry made thereof by said Wylie & Wade, as such brokers of the said purchaser, a consent for the withdrawal of said goods from warehouse by said Wylie & Wade, as follows:

33 "We authorize Wylie & Wade to withdraw the goods described in this entry.

(Signed) "GIBSON, EARLY & CO."

No formal notice was given of this sale by Gibson, Early & Co. to Camp to the collector or any other officer of the customs. The authority to withdraw signed by Gibson, Early & Co. was presented in due course by Wylie & Wade when they desired to withdraw the goods.

Sixth. That it was the established and uniform usage of trade in New York at the times of said sales and deliveries and long before for importers to make sales of imported goods which were in warehouse in bond, the purchaser on such sales assuming the payment of the duties thereon, and being allowed and credited by the seller with the amount of the duties so assumed as so much paid on account of or deducted from what would
34 otherwise have been the purchase price, and for the seller to make delivery of said goods in bond by signing a written consent to the withdrawal of said goods by the purchaser, and it was also in accordance with such usage and custom for successive sales and deliveries of goods in bond to be made, on similar terms and in the same manner, so long as any of such goods remained in warehouse, the last purchaser withdrawing the goods under the written consent so received by him upon and as the delivery thereof, and paying the duties thereon on such withdrawal.

Seventh. That the said custom and usage were at the times aforesaid well known and understood, and the established and settled practice at the custom-house in New York was to treat the party holding such consent for withdrawal, and him only, as the person entitled to withdraw and receive the goods on payment of the duties, and upon the payment by him
35 of the duties remaining due thereon, and not otherwise, to issue a written permit for the actual delivery to him of said goods out of warehouse.

Eighth. That during the period covered by the transactions hereinbefore set forth the following regulations of the Treasury Department were in force, to wit:

"ART. 442. The entry for withdrawal of merchandise from warehouse for consumption at port of original importation shall be made by the

party in whose name the merchandise was warehoused, or by some person duly authorized for the purpose by him, and in either case shall be signed by the party making the withdrawal. This entry shall exhibit the marks and numbers of the packages, the description and quality of the goods, and the dutiable value of the same. On presentation to the proper officer in the collector's office, it shall be compared with the record on the
36 warehouse books of the original warehouse entry, and if found correct, be properly entered therein, the warehouse bond number endorsed thereon, and the amount of duties payable estimated. From the collector's office it shall then be taken by the importer to the naval office, where a similar comparison shall be made with the warehouse records of that office, and the estimate of duties verified and endorsed upon the duplicate entry. The amount of duties thus ascertained having been paid, a permit will be issued for the delivery of the goods." (Here follows the form in which the entry shall be made.)

"ART. 443. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper, and other articles bought and sold by weight, when withdrawn for export or transportation, must be entered for such destination at the actual quantities on which duties were estimated at the time of arrival in the
37 United States, and to secure this weighers, measurers, and *guagers* will be required to mark on each package its contents as determined by them on its entry for warehouse. On these quantities the duties on export and transportation entries will be estimated. Goods withdrawn for consumption may be taken at average valuations, care being had that on the last withdrawal the entire balance of duty be collected.

"ART. 444. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption, and the difficiency, if any, collected on amendment to said entry."

(Here follows the form of the permit to deliver for consumption, which must be countersigned by the naval officer.)

38 Ninth. That on the fourth day of September, 1865, when the said Wylie & Wade, as brokers of the said Hugh H. Camp as aforesaid, made the withdrawal entry of the residue of said sugars, viz: J. M. R. fifteen hhds. and thirty tierces; La Fe one hundred and ninety-seven hogsheads and one tierce; A. M. thirty-three hogsheads and twenty-six tierces, the weight of said sugars so entered for withdrawal was 361,996 pounds, and that the amount of duty due the United States thereon was, at the rate of three cents per pound, the rate then fixed by law, ten thousand eight hundred and fifty-nine dollars and eighty-eight cents; that
39 nevertheless the said collector demanded from said Wylie & Wade as the duties thereon only the sum of $9,352.89, being at the rate of three cents per pound upon 311,763 pounds and no more, and delivered the said goods to them without exacting or claiming the further sum of $1,506.99, which was in fact due upon said goods, and that the said goods so withdrawn by and delivered to Wylie & Wade were at the time of much greater value than the whole amount of the duties chargeable thereon, and upon the payment by said Wylie & Wade of the aforesaid amount of $9,352.89 and no more, the said collector and naval officer voluntarily and without the knowledge or consent of said Grinnell, Minturn & Co.

signed and issued to said Wylie & Wade the permit for the withdrawal of said goods whereby they procured the delivery of the same to themselves.

Tenth. That the said Grinnell, Minturn & Co. had no notice or knowledge of said final withdrawal of said sugars, or that the same had
40 been so permitted to be withdrawn, or had been delivered to the parties withdrawing the same without exacting the full amount of duties due thereon, or that the said sum of $1,509.66 or any sum whatever remained due to the United States for duties upon said sugars until the sixth day of December, 1867, when notice of such balance remaining unpaid was served upon them by the collector.

Eleventh. That the said Wylie & Wade had become and were insolven, before such notice was received by said Grinnell, Minturn & Co., and the said Gibson, Early & Co. had become and were insolvent before the trial of this action.

Twelfth. That there still remains due to the United States for duties which should have been collected from the parties who made the said final withdrawal of said sugars the sum of $1,509.66, with interest from the fonrth day of September, 1865, amounting at this date to two thousand
41 one hundred and sixteen dollars and eighty-five cents; and upon the above facts I find, as

CONCLUSIONS OF LAW,

First. That the facts above found constitute no bar to a recovery by the plaintiffs against the defendants as principals on the bond sued on.

Second. That if the defendants are to be regarded as sureties after the transfer of the title to the property in bond, instead of principals, they stand in no better position; for,

Third. The laches of the custom-house officers in delivering the goods without collecting the whole of the duties cannot affect the plaintiffs, as the United States are never bound by the laches of their agents; nor can the defendants set up such laches as a discharge of the obligation which they have entered into. Judgment must therefore go for the plaintiffs.

WM. D. SHIPMAN, *Judge.*

42 Therefore, it is considered that the said plaintiffs recover from the said defendants the said sum of twenty-one hundred and sixteen $\frac{85}{100}$ dollars damages, besides nine hundred and seventy-nine $\frac{26}{100}$ dollars interest, and costs, amounting in all to thirty hundred and ninety-six $\frac{11}{100}$ dollars, and the said plaintiffs have execution therefor.

Judgment signed this 11th day of Oct., 1879.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. The United States vs. John W. Minturn, Robert D. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, and R. M. Clark. Judgment record. Stewart L. Woodford, U. S. attorney. U. S. circuit court. Filed Oct. 11, 1879. John I. Davenport, clerk. Debt 2,116.85 gold. Cost & interest, 979.26 gold. $3,096.11 gold.

43 Circuit court of the United States of America for the southern dis-

trict of New York, in the second circuit, of the second day of September, as yet of April term, in the year of our Lord one thousand eight hundred and sixty-eight.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The United States of America, plaintiffs in this suit, by Samuel G. Courtney, their attorney for the said southern district of New York, complain of John W. Minturn, Robert B. Minturn, jun'r, W. H. Swan, Elias Wade, John W. Ahman, survivors of the late firm of Grinnell, Minturn & Company, and R. M. Clark, defendants in this suit, the said defendants John W. Minturn, Robert B. Minturn, jun'r, W. H. Swan, Elias Wade, jr., John W. Ahman, and R. M. Clark being in custody, &c., of a plea that the said defendants render unto the said plaintiffs the sum of forty-seven thousand five hundred and seventy-five dollars ninety-eight cents,
44 lawful money of the United States of America, which the said defendants to the said plaintiffs owe, and from them unjustly detain, debt on bond. For that whereas the said defendants heretofore, to wit, on the second day of August, in the year one thousand eight hundred and sixty-five, at the city of New York, to wit, at the southern district of New York aforesaid, and within the jurisdiction of this court, by a certain bond or writing obligatory, bearing date the day and year last aforesaid, sealed with the seals of the said defendants, which said bond or writing obligatory the said plaintiffs now here bring into court and show to the said court, the said defendants John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., and John W. Ahman, as principals, and the said defendant R. M. Clark, as surety, became held and firmly bound unto the said plaintiffs in the sum of forty-seven thousand five hundred and seventy-five dollars and ninety-eight cents, for the payment whereof to the said
45 plaintiffs the said defendants bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

And the plaintiffs aver that on the day and year last aforesaid, and at the place and within the jurisdiction aforesaid, the said defendants John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., and John W. Ahman, together with one Robert B. Minturn, at the time of the commencement of this suit deceased, were copartners in trade under the name, style, and firm of Grinnell, Minturn and Company.

And the said plaintiffs further say that the said bond or writing obligatory was and is subject to a certain condition thereunder written, to the effect following, that is to say: That if the above bounden principals (the said defendants John W. Minturn, Robert B. Minturn, jun'r, W. H. Swan, Elias Wade, jun'r, John W. Ahman, together with Robert B. Minturn, deceased, meaning) or either of them, or either of their heirs, executors, administrators, or assigns, should, on or before the expiration of one
46 year from the date of the importation of the goods, wares, and merchandize thereinafter mentioned, withdraw the said goods, wares, and merchandize, in the mode prescribed by law, from the public store or bonded warehouse where they might be deposited at the port of New York, and well and truly pay unto the collector of customs of the said United States for the said port the sum of twenty-three thousand seven hundred and eighty-seven $\frac{99}{100}$ dollars, or the true amount when ascertained of the

duties imposed by laws then existing, or to be thereafter enacted, upon the said goods, wares, and merchandize, the same having been imported by them in the bark Ocean Home, Nickerson, master, from Carkarien, and consisting of (various marks) five hundred and eighty packages sugar, or should, after the expiration of one year, and before the expiration of three years from the date aforesaid, so withdraw the same and pay to the said collector the sum aforesaid, or the true amount when ascertained of duties
47 imposed by such laws thereon, and also pay an additional sum or duty of ten per centum of the said duties, or should, in the mode prescribed by law, on or before the expiration of three years from the said date, withdraw the same and actually export them beyond the limits of the United States, or transport them in bond to a port of the Pacific or western coast of the United States, under such regulations as the Secretary of the Treasury might from time to time prescribe, then that obligation was to be void, else it should be and remain in full force and virtue.

And the said plaintiffs aver, as a breach of the condition of the said bond or writing obligatory, that though the said time of one year in the condition of the said bond or writing obligatory mentioned has long since expired, that they, the said defendants, John W. Minturn, Robert B. Minturn, jun'r, W. H. Swan, Elias Wade, jun'r, John W. Ahman, and R. M. Clark, or any or either of them, or any one on their behalf,
48 at the city of New York, to wit, at the southern district of New York aforesaid, and within the jurisdiction of this court, did not within the said time of one year from the date of the importation of the said goods, wares, and merchandize, to wit, the said various marks, five hundred and eighty packages sugar, withdraw the said goods, wares, and merchandize in the mode prescribed by law from the public store or bonded warehouse where they were deposited at the port of New York, and did not well and truly pay unto the collector of customs of the said United States for the said port the sum of twenty-three thousand seven hundred and eighty-seven $\frac{99}{100}$ dollars, or the true amount when ascertained of the duties imposed by laws then existing or thereafter enacted, upon the goods, wares, and merchandize, to wit, the goods, wares, and merchandize imported by them in the bark Ocean Home, Nickerson, master, from Carkarien, and consisting of various marks, five hundred and eighty packages of
49 sugar, nor did they, the said defendants, nor any one acting in their behalf, after the expiration of one year nor before the expiration of three years from the date aforesaid, so withdraw the same and pay to the said collector the sum aforesaid or the true amount when ascertained of the duties imposed by such laws thereon, and also pay an additional sum or duty equal to ten per centum of said duties, nor did, in the mode prescribed by law, on or before the expiration of three years from the said date, withdraw the same and actually export them beyond the limits of the United States, or tranship them in bond to a port of the Pacific or western coast of the United States, under such regulations as the Secretary of the Treasury did from time to time prescribe, but so to do have wholly neglected and refused, and still do neglect and refuse, to wit, at the southern district of New York aforesaid, by means of which said several premises an action hath accrued to the said plaintiffs to have and demand from the said defendants the said sum of money
50 above demanded, together with their damages, by reason of the

aforesaid unjust detention thereof, to forty-seven thousand five hundred and seventy-five dollars and ninety-eight cents, and therefore they, the said plaintiffs, bring suit, etc.

S. G. COURTNEY,
U. S. Attorney.

51 In the circuit court of the United States for the southern district of New York.

JOHN W. MINTURN, ROBERT B. MINTURN, junior, WILLIAM H. SWAN, ELIAS WADE, junior, and JOHN N. ALMAN, survivors of the late firm of GRINNELL, MINTURN & Co., & R. M. CLARK,
ads.
THE UNITED STATES OF AMERICA.

And the said defendants, John W. Minturn, Robert B. Minturn, junior, William H. Swan, Elias Wade, junior, John N. Ahman, survivors as aforesaid, and R. M. Clark, defendants in this action, by Evarts, Southmayd & Choate, their attorneys, come and defend the wrong and injury, when, &c., and say that the said supposed writing obligatory in the declaration mentioned is not their deed, and of this they put themselves upon the country, and the said plaintiffs do the like, &c.

52 And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, they say, that after the making of the said bond or writing obligatory in the declaration mentioned, and before the expiration of one year from the date of the importation of the goods, wares, and merchandize therein mentioned, to wit, on the thirtieth day of September, eighteen hundred and sixty-five, at the city of New York, and within the southern district of New York, the principals in the said bond, viz, the defendants, John W. Minturn, Robert B. Minturn, jun'r, William H. Swan, Elias Wade, junior, and John N. Ahman, together with Robert B. Minturn, deceased, by themselves and their assigns, did withdraw the said goods, wares, and merchandise in the mode presented by law, from the bonded warehouse where the same was deposited at the port of New

53 York, and did well and truly pay unto the collector of the customs of the United States for the said port the true amount of all the duties imposed by the laws existing at the time of the making of the said bond or writing obligatory, or thereafter enacted, upon the said goods, wares, and merchandise, that is to say, the sum of twenty-three thousand seven hundred and eighty-seven dollars and ninety-nine cents, and this the said defendants are ready to verify. Wherefore they pray judgment whether the plaintiffs ought to have or maintain the aforesaid action thereof against them, &c.

EVARTS, SOUTHMAYD & CHOATE,
Defendants' Attorneys.

I, Charles F. Southmayd, a counsellor of this court, do certify that in my opinion the foregoing special plea is well founded.

CHARLES F. SOUTHMAYD.

SIR: Please take notice that under the plea of non est factum
54 above pleaded the defendants will give in evidence, in bar of the plaintiff's recovery against them, that after the making of the bond or writing obligatory in the declaration mentioned, and on or about the 8th day of August, 1865, the principals on the said bond, viz, the firm of Grinnell, Minturn & Co., bargained and sold the goods, wares, and merchandise, the duties whereon were secured by the said bond, viz, the five hundred and eighty packages of sugar in the declaration mentioned, to certain persons trading as merchants of Cincinnati, Ohio, under the firm name of Gibson, Early & Co., subject to the payment by said Gibson, Early & Co. of the duties payable to the United States thereon, the payment of which duties was assumed by said Gibson, Early & Co. as part of the price of said merchandise; and thereupon Grinnell, Minturn & Co. made delivery to Gibson, Early & Co. in bond, subject to the said duties, by giving to said Gibson, Early & Co. a consent in writing agreeable to the law and usage in such cases, authorizing and empowering said Gibson, Early & Co. make a withdrawal entry of the said merchandise and receive the same
55 from the bonded warehouse where the same was stored in the legal custody of the United States, and subject to their lien thereon for the duties, upon payment to the United States of the duties thereon in exoneration of Grinnell, Minturn & Co.'s liability for such duties, and only upon condition of such payment and exoneration, of all which premises the United States, through the collector and other proper officers of the customs, had due notice and knowledge, and that the United States with such full notice and knowledge did permit the said Gibson, Early & Co. and their assigns to withdraw from warehouse and to receive from its bonded warehouse where the same was stored as aforesaid the said merchandise, and did deliver or cause to be delivered to said Gibson, Early & Co. and their assigns the whole of said merchandise, and released and gave up the possession thereof and the lien of the United States thereon, receiving from said Gibson, Early & Co. and their assings on account of such duties the sum of twenty-two thousand two hundred and eighty-one dollars, and as to the residue of such duties
56 viz, the sum of fifteen hundred and six dollars and ninety-nine cents, voluntarily omitting to demand or exact the same, and that they did so with full knowledge and notice that under and by reason of the circumstances aforesaid the said merchandise in the hands of Gibson, Early & Co. and their assigns had become, as between them and Grinnell, Minturn & Co., the primary fund for the payment of said duties; and that Grinnell, Minturn & Co., as between them and the parties aforesaid, stood merely as sureties for said duties, and with further notice and knowledge that Grinnell, Minturn & Co., as original importers of said merchandize, had never consented to or authorized the withdrawal of said merchandise from the legal custody of the United States by Gibson, Early & Co. or their assigns save upon condition of full payment of the duties thereon in their examination as aforesaid, and that at the time when the United States so permitted the withdrawal of said merchandise, and relinquished their possession and lien as aforesaid, and at all times from the time
57 of the giving of the bond aforesaid, the said merchandise was full and ample security for the amount of the said duties thereon, that is to say, the value thereof was about three times the amount of the duties, of

all which premises the plaintiffs had due notice, and that Grinnell, Minturn & Co. had no notice, knowledge, or suspicion that said merchandise had been withdrawn without full payment of the duty, or that said bond had not been fully paid and satisfied until the month of December, 1867, by means of which premises these defendants became and were and are legally discharged from their liability upon the bond aforesaid. And these defendants will further give in evidence that in August and September, 1865, Gibson, Early & Co. bargained and sold a portion of the said merchandise, that is to say, three hundred and seventy-five hogsheads and fifty-seven tierces of said sugar, to the firm of Wylie & Wade, subject to the duties thereon, the payment of which duties was assumed by
58 Wylie & Wade as part of the price of said merchandise; and Gibson, Early & Co. thereupon made delivery of said merchandise to Wylie & Wade in bond, by giving to them a consent to withdraw the same from warehouse and to receive the same from the bonded warehouse where the same was stored upon payment by said Wylie & Wade to the United States of the duties thereon, and not otherwise; that the short payment of duties to the extent of fifteen hundred and six dollars and ninety-nine cents hereinbefore mentioned occurred upon occasion of the withdrawal of this merchandise by Wylie & Wade as the assigns of Gibson, Early & Co., as aforesaid, and such withdrawal and short payment, and the receipt of such merchandise by Wylie & Wade, and the relinquishment of the plaintiffs' possession and lien for the duties as aforesaid were permitted by the plaintiffs with full knowledge and notice on their
59 part of all the matters hereinbefore stated, and in disregard and violation of the condition upon which alone Gibson, Early & Co. had authorized Wylie & Wade to withdraw or receive said merchandise, and that Wylie & Wade became and were wholly insolvent before either Gibson, Early & Co. or Grinnell, Minturn & Co. had any notice, knowledge, or suspicion of such withdrawal of said merchandise upon short payment of the duties, and they have so ever since continued.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Defendants.

To SAMUEL G. COURTNEY, Esq.,
U. S. District Attorney.

60 In the United States circuit court.

THE UNITED STATES
vs.
JOHN W. MINTURN AND OTHERS.

And afterwards, to wit, at a term of the circuit court of the United States, held at the city of New York, in and for the southern district of New York, in the second circuit, on the 17th day of May, in the year one thousand eight hundred and seventy-two, before the honorable William D. Shipman, one of the judges of the said circuit court, the issue so joined between the said parties as aforesaid came on to be tried before the said judge, without a jury, according to a stipulation of the parties filed with the clerk waiving a jury, as by the act of Congress provided; at which

day came as well the said plaintiff as the said defendants, by their respective attorneys, as aforesaid; and upon the trial of said issues, after hearing the proofs and arguments of the parties, the court found the following findings of fact and conclusions of law:

FINDINGS OF FACT.

First. That on the second day of August, 1865, the defendants
61 composing the firm of Grinnell, Minturn & Co., being the owners of certain sugars imported from Carbarien by the barque Ocean Home, viz, two hundred and forty-five hogsheads and thirty tierces marked J. M. R.; one hundred and ninety-seven hogsheads and one tierce marked La Fe; forty-eight hogsheads marked Santa Rosalia, and thirty-three hogsheads and twenty-six tierces marked A. M., entered the same at the custom-house in New York by a regular warehouse entry; and thereupon, on the same day, they, as principals, and the said defendant R. M. Clark, as surety, executed under their respective hands and seals and delivered to the collector the warehouse bond No. 3829, being the bond mentioned in plaintiff's declaration, and on which this suit is brought, of which a copy is hereto annexed, marked Exhibit A, for the purposes therein mentioned; and the said sugars were discharged from said vessel and went into public store and into the custody of the collector, as provided by the acts of Congress relating to warehousing of imported goods.

62 Second. That afterwards, and on or about the eighth day of August, 1865, said Grinnell, Minturn & Co. bargained and sold to Gibson, Early & Co., merchants of Cincinnati, Ohio, the whole of the said five hundred and eighty packages of sugar, the same being then still in warehouse and held by the collector for duties under the acts relating to the warehousing of imported goods, and that by the terms of said sale, the same were sold expressly subject to the payment of all duties thereon by said Gibson Early & Co., who, as part of the agreed price of said goods on said sale, assumed the payment of said duties, the price, less the duties so assumed, being payable in cash on delivery, and being so paid accordingly. That thereupon in consummation of said sale said Grinnell, Minturn & Co. made delivery of said goods in bond, subject to said duties, by writing at the foot of the said warehouse entry a consent for the withdrawal of said goods from warehouse by said purchasers, as follows:

"AUGUST 9, 1865.

63 "We hereby authorize Mess. Gibson, Early & Co. to withdraw the sugars described in this entry.

(Signed) "GRINNELL, MINTURN & CO."

It was not the custom to give any formal notice to the collector or any other officer of the customs of such sales in bond, nor was any such notice given in this case. The authority to withdraw in the form above stated would be and was presented to the collector in due course before the withdrawal could be made by the vendee.

Third. That the weights of said several lots of sugars, as returned by the official United States weighers of the same, were as follows:

J. M. R., 245 h'ds	312,567	lbs.
" 30 tierces	20,367	"
La Fe, 197 h'ds	255,857	"
" 1 tierce	648	"
Santa Rosalia, 48 h'ds	68,414	"
A. M., 33 "	47,306	"
26 tierces	19,142	"
64 Total weight	755,621	pounds;

upon which the duty at three cents per pounds, the rate fixed thereon by law, was liquidated by the collector at $22,568.63.

Fourth. That afterwards, and on the eleventh day of August, 1865, said Gibson, Early & Co. entered to be withdrawn and to be transported to Cincinnati a portion of said sugars, as follows:

J. M. R., 232 hogsheads, La Fe, 18 do., weighing 325,011 lbs., and the duties thereon were duly paid, amounting to $9,750.33.

That afterwards, and on the twenty-ninth day of said August, said Gibson, Early & Co. withdrew for consumption another portion of said sugars, as follows: 48 hogsheads Santa Rosalia, weighing 48,618 pounds, and the duties thereon were duly paid, amounting to $2,058.42. Each of the said withdrawals was made under the authority of Grinnell, Minturn
65 & Co., as set forth in the second paragraph of this finding of facts.

Fifth. That afterwards, and before the fourth day of September, 1865, Gibson, Early & Co. sold in bond to Hugh N. Camp, a sugar refiner in New York, the residue of said sugars, the same being then in warehouse and held by the collector for duties under the acts of Congress relating to the warehousing of imported goods, and that by the terms of said sale the same were sold in bond, expressly subject to the payment of all duties thereon by said purchaser, who, as part of the agreed price of said goods on said sale, assumed the payment of said duties. That Wylie and Wade, custom-house brokers, were employed by said purchaser, Camp, to withdraw the said sugars so purchased by him and to pay the duties thereon, and for that purpose were furnished by him with the amount of said duties, viz, $10,859.58 in gold.

And thereupon, on said fourth day of September, 1865, in con-
66 sum'ation of said sale, said Gibson, Early & Co. made delivery of the residue of said sugars in bond to the said purchaser, Hugh N. Camp, by writing at the foot of the withdrawal entry made thereof by said Wylie & Wade, as such brokers of the said purchaser, a consent for the withdrawal of said goods from warehouse by said Wylie and Wade, as follows:

"We authorize Wylie & Wade to withdraw the goods described in this entry.

(Signed) "GIBSON, EARLY & CO."

No formal notice was given of this sale by Gibson, Early & Co. to Camp to the collector or any other officer of the customs. The authority to withdraw signed by Gibson, Early & Co. was presented in due course by Wylie & Wade when they desired to withdraw the goods.

Sixth. That it was the established and uniform usage of trade of New

York at the times of said sales and deliveries, and long before, for
67 importers to make sales of imported goods which were in warehouse in bond, *to* the purchaser, on such sales, assuming the payment of the duties thereon, and being allowed and credited by the seller with the amount of the duties so assumed as so much paid on account of or deducted from what would otherwise have been the purchase price, and for the seller to make delivery of said goods in bond by signing a written consent to the withdrawal of said goods by the purchaser, and it was also in accordance with such usage and custom for successive sale and deliveries of good in bond to be made on similar terms and in the same manner so long as any of such goods remained in warehouse, the last purchaser withdrawing the goods under the written consent so received by him upon and as the delivery thereof, and paying the duties thereon on such withdrawal.

Seventh. That the said custom and usage were at the times aforesaid well known and understood, and the established and settled prac-
68 tice at the custom-house in New York was to treat the party holding such consent for withdrawal, and him only, as the person entitled to withdraw and receive the goods on payment of the duties, and upon the payment by him of the duties remaining due thereon, and not otherwise, to issue a written permit for the actual delivery to him of said goods out of warehouse.

Eighth. That during the period covered by the transactions hereinbefore set forth the following regulations of the Treasury Department were in fact, to wit:

"ART. 442. The entry for withdrawal of merchandise from ware-
69 house for consumption at port of original importation shall be made by the party in whose name the merchandise was warehoused or by some person duly authorised for the purpose by him, and in either case shall be signed by the party making the withdrawal. This entry shall exhibit the marks and numbers of the packages, the description and quantity of the goods, and the dutiable value of the same. On presentation to the proper officer in the collection office it shall be compared with the record on the warehouse books of the original warehouse entry, and if found correct be properly entered therein, the warehouse bond number endorsed thereon, and the amount of duties payable estimated. From the collector's office it shall then be taken by the importer to the naval office, where a similar comparison shall be made with the warehouse records of that office and the estimate of duties verified and endorsed upon the duplicate entry. The amount of duties thus ascertained having been paid, a permit will be issued for the delivery of the goods."

(Here follows the form in which the entry shall be made.)

"ART. 443. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper, and other articles bought and sold by weight when withdrawn for export or transportation must be entered for such destination at the
70 actual quantities on which duties were estimated at the time of arrival in the United States, and to secure this weighers, measurers, and gaugers will be required to mark on each package its contents as determined by them on its entry for warehouse. On these quantities the duties on export and transportation entries will be estimated. Goods withdrawn for consumption may be taken at average valuations, care being had that on the last withdrawal the entire balance of duty be collected.

"ART. 444. Should the final withdrawal entry be for exportation, and there be any difference between the actual duty and the amount to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption and the deficiency, if any, collected on amendment to said entry."

(Here follows the form of the permit to deliver for consumption, which must be countersigned by the naval officer.)

Ninth. That on the fourth day of September, 1865, when the said Wylie and Wade as brokers of the said Hugh N. Camp, as aforesaid, made
71 the withdrawal entry of the residue of said sugars, viz: J. M. R. fifteen hhds. and thirty tierces; La Fe, one hundred and ninety-seven hogsheads and one tierce; A. M.. thirty-three hogsheads and twenty-six tierces, the weight of said sugars so entered for withdrawal was 361,996 pounds, and that the amount of duty due to the United States thereon was, at the rate of three cents per pound, the rate then fixed by law, ten thousand eight hundred and fifty-nine dollars and eighty-eight cents.

That nevertheless the said collector demanded from said Wylie and Wade, as the duties thereon, only the sum of $9,352.89, being at the rate of three cents per pound upon 311,763 pounds, and no more, and delivered the said goods to them without exacting or claiming the further sum of $1,506.99, which was in fact due upon said goods; and that the said goods so withdrawn by and delivered to Wylie and Wade were at the time of much greater value than the whole amount of the duties chargeable thereon. And upon the payment by said Wylie and Wade of the aforesaid amount of $9,352.89, and no more, the said collector and naval officer voluntarily, and without the knowledge or consent of said Grinnell, Minturn & Co., signed and issued to said Wylie and Wade the
72 permit for the withdrawal of said goods, whereby they procured the delivery of the same to themselves.

Tenth. That the said Grinnell, Minturn & Co. had no notice or knowledge of the said final withdrawal of said sugars, or that the same had been so permitted to be withdrawn or had been delivered to the parties withdrawing the same without exacting the full amount of the duties due thereon, or that the said sum of $1,509.66, or any sum whatever, remained due to the United States for duties upon said sugars until the sixth day of December, 1867, when notice of such balance remaining unpaid was served upon them by the collector.

Eleventh. That the said Wylie and Wade had become and were insolvent before such notice was received by said Grinnell, Minturn & Co., and the said Gibson, Early & Co. had become, and were, insolvent before the trial of this action.

Twelfth. That there still remains due to the United States for duties which should have been collected from the parties who made the said final withdrawal of said sugars the sum of $1,509.66, with interest from the fourth day of September, 1865, amounting at this date to two thou-
73 sand one hundred and sixteen dollars and eighty-five cents.

And upon the above facts the court found, as

CONCLUSIONS OF LAW,

First. That the facts above found constitute no bar to a recovery by the plaintiffs against the defendants as principals on the bond sued on.

To which conclusion of law so found and adjudged by the court, and to each and every part thereof the defendants' counsel, duly excepted.

Second. That if the defendants are to be regarded as sureties after the transfer of the title to the property in bond, instead of principals, they stand in no better position.

To which conclusion of law so found and adjudged by the court, and to each and every part thereof, the defendants' counsel duly excepted.

Third. The laches of the custom-house officers in delivering the goods without collecting the whole of the duties cannot affect the plaint-
74 iffs, as the United States are never bound by the laches of their agents, nor can the defendants set up such laches as a discharge of the obligation which they have entered into.

To which conclusion of law so found and adjudged by the court, and to each and every part thereof, the defendants' counsel duly excepted.

Fourth. Judgment must therefore go for the plaintiffs.

To which conclusion of law so found and adjudged by the court, and to each and every part thereof, the defendants' counsel excepted.

The counsel for the defendants upon the trial, and in due season, asked the court to find and decide as matter of law:

First. That under the facts proved in this case, the plaintiff is not entitled to recover from the defendants upon the warehouse bond, or otherwise, the amount of the balance claimed to be remaining unpaid or any partt thereof.

75 But the court refused so to find and decide, and to such refusal the counsel for the defendants duly excepted.

Second. That by means of the voluntary delivery by the collector of the last instalment of the sugars to Wylie and Wade under the consent which had been given by Grinnell, Minturn and Co. to Gibson Early & Co. for the withdrawal of the goods without exacting or requiring the payment of the duties chargeable thereon, and by the voluntary surrender of the lien of the United States upon the goods for the duties, the liabilities of the defendants as sureties for the payment of such duties was discharged.

But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

Third. That the plaintiffs having in their hands the sugars as security for the payment of duties, and which were in value more than sufficient to pay them, cannot, after their voluntary delivery thereof to Wylie and Wade without exacting the duties as the laws and usage required,
76 have recourse to the warehouse bond of the defendants for such duties.

But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

Fourth. That after the sale of the sugars in bond by the plaintiffs and the delivery thereof by them to the purchaser by their written consent to the withdrawal upon the original warehouse entry, the plaintiffs were not entitled to relinquish their custody of and lien upon the goods which might have been made effectual for the payment of the duties, without the con-

sent of the defendants or without by so doing discharging them from their liability for such duties.

But the court refused, to find or decide, and to such refusal the defendants' counsel duly excepted.

Fifth. That after the sale and delivery of the goods in bond the defendants were but sureties for the payment of the duties, and the plaintiffs were bound to look, first, to the goods themselves and to the parties withdrawing them for the same, and could not recover against the defendants without showing that they had exhausted their lien upon the goods and that they were insufficient in value to pay the duties.

77 But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

Sixth. That a private creditor standing in the same relation to the goods and to the defendants as the plaintiffs did, could not have voluntarily surrendered the goods which had been placed in his hands as security for the payment of the debt, and which were available for that purpose, otherwise than by the consent of the defendants, without discharging them, and that the United States by so doing have discharged them, and are entitled to no higher or other rights than a private creditor would be in the same case.

But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

Seventh. That the defendants' consent to the withdrawal of the goods by Gibson, Early & Co. must be deemed not a consent to their unconditional delivery or to their delivery without the payment of duties, but only to their withdrawal from warehouse in the manner and upon the terms and conditions prescribed by law and by the treasury regulations and by

78 usage, viz, upon the payment of all duties thereon, and such duties having been first paid, and not otherwise.

But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

Eighth. That the question in issue is not a question of laches, but as to the legal effect of the actual delivery of the goods by the collector without first requiring payment of the duties for which they were held.

But the court refused so to find or decide, and to such refusal the defendants' counsel duly excepted.

And inasmuch as the said exceptions to such findings and the said requests to find and refusals thereof do not otherwise appear, the said counsel for the defendants did propose these his exceptions in writting to the said refusals to find and to the said conclusions of the court, and requested the said justice to put his seal to this bill of exceptions containing the said rulings, refusals, and exceptions as aforesaid, according to the form of the statute in such case made and provided.

And thereupon the said justice of the said court, at the request of

79 the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the said statute and the rules and practice of the said court, on the seventeenth day of May, in the year one thousand eight hundred and seventy-two.

Allowed.

WM. D. SHIPMAN, *Judge.* [SEAL.]

(Endorsed:) In the United States circuit court. The United States ag'st John W. Minturn and others. Bill of exceptions. U. S. circuit court. Filed Oct. 11, 1879. John I. Davenport clerk.

80 Supreme Court of the United States.

JOHN W. MINTURN, ROBERT B. MINTURN, junior, WILLIAM H. SWAN, ELIAS WADE, junior, JOHN N. AHMAN, survivors, &c., and R. M. CLARK, plaintiffs in error,
against
THE UNITED STATES, DEFENDANTS IN ERROR.

Of October term, in the year of our Lord one thousand eight hundred and seventy-nine.

Afterwards, to wit, on the third Monday of October term, 1879, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said John W. Minturn, Robert B. Minturn, junior, William H. Swan, Elias Wade, junior, John N. Ahman, survivors, &c., and R. M. Clark, by Evarts, Southmayd and
81 Choate, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the court refused to find and decide as matter of law—

That under the facts proved in this case the plaintiff is not entitled to recover from defendants, upon the warehouse bond or otherwise, the amount of the balance claimed to be remaining unpaid, or any part thereof.

Second. That the court refused to find and decide as matter of law—

That by means of the voluntary delivery by the collector of the last instalment of the sugars to Wylie and Wade, under the consent which had been given by Grinnell, Minturn & Co. to Gibson, Early and Co. for the withdrawal of the goods without exacting or requiring the payment
82 of the duties chargeable thereon, and by the voluntary surrender of the lien of the United States upon the goods for the duties, the liability of the defendants as sureties for the payment of such duties was discharged.

Third. That the court refused to find and decide as matter of law—

That the plaintiffs having in their hands the sugars as security for the payment of duties, and which were in value more than sufficient to pay them, cannot after their voluntary delivery thereof to Wylie and Wade without exacting the duties, as the laws and usage required, have recourse to the warehouse bond of the defendants for such duties.

Fourth. That the court refused to find and decide as matter of law.

That after the sale of the sugars in bond by the plaintiffs, and the delivery thereof by them to the purchaser, by their written consent
83 to the withrawal upon the original warehouse entry, the plaintiff were not entitled to relinquish their custody of and lien upon the goods, which might have been made effectual for the payment of the duties, without the consent of the defendants, or without by so doing discharging them from their liability for such duty.

Fifth. That the court refused to find and decide as matter of law—

That after the sale and delivery of the goods in bond the defendants

were but sureties for the payment of the duties, and the plaintiffs were bound to look first to the goods themselves and to the parties withdrawing them for the same, and could not recover against the defendants without showing that they had exhausted their lien upon the goods, and that they were insufficient in value to pay the duties.

Sixth. That the court refused to find and decide as matter of law—

That a private creditor standing in the same relation to the
84 goods and to the defendants as the plaintiffs did, could not have voluntarily surrendered the goods which had been placed in his hands as security for the payment of the debt, and which were available for that purpose, otherwise than by the consent of the defendants, without discharging them, and that the United States by so doing have discharged them and are entitled to no higher or other rights than a private creditor would be in the same case.

Seventh. That the court refused to find and decide as matter of law—

That the defendants' consent to the withdrawal of the goods by Gibson, Early and Co. must be deemed not a consent to their unconditional delivery, or to delivery without the payment of duties, but only to their withdrawal from warehouse in the manner and upon the terms and conditions prescribed by law and by the treasury regulations and by
85 usage, viz, upon the payment of all duties thereon, and such duties having been first paid, and not otherwise.

Eighth. That the court refused to find and decide as matter of law—

That the question in issue is not a question of laches, but as to the legal effect of the actual delivery of the goods by the collector without first requiring payment of the duties for which they were held.

Ninth. That the court found and decided as matter of law—

That the facts found constitute no bar to a recovery by the plaintiffs against the defendants as principals on the bond sued on.

Tenth. That the court found and decided as matter of law—

That if the defendants are to be regarded as sureties, after the transfer of the title to the property in bond, instead of principals, they stand in no better position.

Eleventh. That the court found and decided as matter of law—

86 That the laches of the custom-house officers in delivering the goods without collecting the whole of the duties, cannot affect the plaintiffs, as the United States are never bound by the laches of their agents, nor can the defendants set up such laches as a discharge of the obligation which they have entered into.

Twelfth. That the court found and decided as matter of law—

That judgment must go for the plaintiffs.

And the said John W. Minturn, Robert B. Minturn, junior, William H. Swan, Elias Wade, junior, John N. Ahman, survivors, &c., and R. M. Clark pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Plaintiffs in Error.

87 (Endorsed:) United States Supreme Court. John W. Minturn

& others vs. The United States. Assignment of Errors. Evarts, Southmayd & Choate, attorneys for plaintiffs in error.

Due and timely service of a copy of the within assignment of errors is hereby admitted.
New York, October 13th, 1879.

STEWART L. WOODFORD,
U. S. Attorney.

U. S. circuit court. Filed Oct. 13, 1879. John I. Davenport, clerk.

88 United States Supreme Court.

JOHN W. MINTURN ET AL., P'FFS IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEF'TS in error.

Afterwards, to wit, on the third Monday of October term, 1879, the United States of America, by Stewart L. Woodford, their attorney, freely come here into court and say that there is no error, either in the records and proceedings aforesaid or in giving the judgment aforesaid.

And they pray that said Supreme Court, before the justices thereof, now here to proceed to examine as well the record and proceedings aforesaid above assigned, for error, and that the judgment, aforesaid in form aforesaid given, may be in all things affirmed, etc.

STEWART L. WOODFORD,
U. S. Attorney.

89 (Endorsed:) U. S. Supreme Court. John W. Minturn et al., pl'ffs in error, vs, The United States, def'ts in error. Joinder in error. Stewart L. Woodford, U. S. attorney.

Due & timely service of a copy of the within is hereby admitted.
Sept. 13, 1879.

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Pl'ff's in Error.

U. S. circuit court. Filed Oct. 14, 1879. John I. Davenport, clerk.

90 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE UNITED STATES
vs.
JOHN W. MINTURN, ROBERT B. MINTURN, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, survivors, &c., and R. M. Clark.

Know all men by these presents that we, H. F. Sewall and William Lintz, of the city of New York, are held and firmly bound unto the above-

named The United States of America in the sum of seven thousand dollars, to be paid to the said The United States, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas the above-named John W. Minturn et al. have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York;

Now, therefore, the condition of this obligation is such that if the above-named John W. Minturn et al. shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be null and void; otherwise the same shall be and remain in full force and virtue.

H. F. SEWALL. [L. S.]
WILLIAM LINTZ. [L. S.]

Sealed and delivered and taken and acknowledged this eleventh day of October, 1879, before me, a notary public in and for the city and county of New York.

[L. S.] FREDERICK B. JENNINGS,
Notary Public (8), *New York Co.*

91 UNITED STATES OF AMERICA,
Southern District of New York, ss:

H. F. Sewall and William Lintz, both of the city of New York, being severally duly sworn, do depose and say, and each for himself deposes and says that he resides in the city of New York, and is a freeholder in the State of New York, and that he is worth the sum of fourteen thousand dollars over and above all his just debts and liabilities.

H. F. SEWALL.
WILLIAM LINTZ.

Sworn to this eleventh day of October, A. D. 1879, before me.

[L. S.] FREDERICK B. JENNINGS,
Notary Public (8) *New York Co.*

Approved Oct. 11th, 1879.

SAM'L BLATCHFORD, *C. J.*

(Indorsed:) U. S. circuit court. John W. Minturn et al., pl'ffs in error, vs. The United States, def'ts in error. Bond for damages and costs on . Evarts, Southmayd & Choate, att'ys for pl'ffs in error. U. S. circuit court. Filed Oct. 11, 1879. John I. Davenport, clerk.

92 UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the twenty-seventh of October, eighteen hundred and seventy-nine, pursuant to a writ

of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John W. Minturn, Robert B. Minturn, junior, W. H. Swan, Elias Wade, junior, John W. Ahman, survivors, &c., and R. M. Clark are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Oct. 11, 1879.

SAM'L BLATCHFORD, *C. J.*

(Indorsed:) A 250. U. S. Supreme Court. John W. Minturn et al., plaintiffs in error, against The United States, defendant in error. Citation. Evarts, Southmayd & Choate, attorneys for plaintiffs in error, 52 Wall st., New York City.

Due & timely service of the within citation is hereby admitted.

New York, October, 1879.

STEWART L. WOODFORD,
U. S. Attorney.

U. S. circuit court. Filed Oct. 13, 1879. John I. Davenport, clerk.

(Indorsement on cover:) No. 121. John W. Minturn, Robert B. Minturn, jr., W. H. Swan, Elias Wade, jr., John W. Ahman, survivors, &c., and R. M. Clarke, plaintiffs in error, vs. The United States. S. New York C. C. U. S. Filed 23 October, 1879.

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

OFFICE SUPREME COURT U.S.
FILED
DEC 6 1882
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

JOHN W. MINTURN AND OTHERS,
Plaintiffs in Error,
vs.
THE UNITED STATES.

No. 121.

BRIEF FOR PLAINTIFFS IN ERROR.

Case.

The United States sued the firm of Grinnell, Minturn & Co. as principals and Clark as surety upon a bond, in the usual form and as required by statute, upon an entry for warehouse of 580 packages of sugar imported by the bark *Ocean Home.*

Rec., pp. 3–4.

The defendants pleaded *non est factum*, and a special plea of performance of the condition, and annexed a special notice of the particulars of the defense, as shown on the proofs at the subsequent trial.

Rec., pp. 5–7.

The cause was tried before Judge Wm. D. Shipman, holding the Circuit, without a jury, and the court found the *facts* and *conclusions of law* as follows:

FINDINGS OF FACT.

First.—That on the second day of August, 1865, the defendants, composing the firm of Grinnell, Minturn & Co., being the owners of certain sugars imported from Carbarian by the barque *Ocean Home*, viz.: two hundred and forty-five hogsheads and thirty tierces marked J. M. R.; one hundred and ninety-seven hogsheads and one tierce marked La Fe; forty-eight hogsheads marked Santa Rosalia, and thirty-three hogsheads and twenty-six tierces marked A. M., entered the same at the Custom House in New York by a regular warehouse entry; and thereupon, on the same day, they, as principals, and the said defendant R. M. Clark as surety, executed under their respective hands and seals, and delivered to the collector, the *warehouse bond* No. 3,829, being the bond mentioned in plaintiffs' declaration, and on which this suit is brought, of which a copy is hereto annexed, marked Exhibit A, for the purpose therein mentioned, and the said sugars were discharged from said vessel and went into public store, and into the custody of the collector, as provided by the acts of Congress relating to *warehousing* of imported goods.

Second.—That afterwards, and on or about the eighth day of August, 1865, said Grinnell, Minturn & Co. bargained and sold to Gibson, Early & Co., merchants of Cincinnati, Ohio, the whole of the said five hundred and eighty packages of sugar, the same being then still in warehouse, and held by the collector for duties under the acts relating to the warehousing of imported goods, and that by the terms of said sale the same were sold expressly subject to the payment of all duties thereon by said Gibson, Early & Co., who, as part of the agreed price of said goods on said sale, assumed the payment of said duties, the price less the duties so assumed being payable in cash on delivery, and being so paid accordingly.

That thereupon, in consummation of said sale, said Grinnell, Minturn & Co. made delivery of said goods in bond subject to said duties by writing at the foot of the said

warehouse entry a consent for the withdrawal of said goods from warehouse by said purchasers, as follows:

"AUGUST 9TH, 1865.

"We hereby authorize Mess. Gibson, Early & Co. to "withdraw the sugars described in this entry.

"(Signed) GRINNELL, MINTURN & Co."

It was not the custom to give any formal notice to the collector or any other officer of the customs of such sales in bond, nor was any such notice given in this case. The authority to withdraw in the form above stated would be and was presented to the collector in due course before the withdrawal could be made by the vendee.

Third.—That the weights of said several lots of sugars as returned by the official United States weighers of the same were as follows:

J. M. R.	245 hhds	312,867	lbs.
"	30 tierces	20,367	"
La Fe	187 hhds	286,857	"
"	1 tierce	648	"
Santa Rosalia	48 hhds	68,614	"
A. M.	33 "	47,306	"
"	26 tierces	19,142	"
Total weight		755,621	pounds;

upon which the duty at three cents per pound, the rate fixed thereon by law, was liquidated by the collecter at *$22,668.63.*

Fourth.—That afterwards, and on the eleventh day of August, 1865, said Gibson, Early & Co. entered to be withdrawn and to be transported to Cincinnati, a portion of said sugars, as follows; J. M. R. 232 hogsheads; La Fe, 18 do weighing 325,011 lbs., and the *duties thereon* were duly paid, amounting to $9,750.33.

That afterwards, and on the twenty-ninth day of August,

said Gibson, Early & Co. withdrew for consumption another portion of said sugar, as follows: 48 hogsheads Santa Rosalia, weighing 48,618 lbs., and the duties thereon were duly paid, amounting to *$2,058.42*.

Each of the said withdrawals was made under the authority of Grinnell, Minturn & Co., as set forth in the second paragraph of this finding of facts.

Fifth.—That afterwards, and before the fourth day of September, 1865, Gibson, Early & Co. sold in bond to Hugh N. Camp, a sugar refiner in New York, the residue of said sugars, the same being then in warehouse and held by the collector for duties under the acts of Congress relating to the warehousing of imported goods, and that by the terms of said sale the same were sold in bond expressly subject to the payment of all duties thereon by said purchaser, who, as part of the agreed price of said goods on said sale, assumed the payment of said duties. That Wylie & Wade, Custom House brokers, were employed by said purchaser, Camp, to withdraw the said sugars so purchased by him and to pay the duties thereon, and for that purpose were *furnished by him* with the amount of said duties, viz., *$10,859.58 in gold.* And thereupon and on said fourth day of September, 1865, in consummation of said sale, said Gibson, Early & Co. made delivery of the residue of said sugars in bond to the said purchaser, Hugh N. Camp, by writing at the foot of the withdrawal entry made thereof by said Wylie & Wade, as such brokers of the said purchaser, a consent for the withdrawal of said goods from warehouse by said Wylie & Wade, as follows:

"We authorize Wylie & Wade to withdraw the goods "described in this entry.

"(Signed) GIBSON, EARLY & CO."

No formal notice was given of this sale by Gibson, Early & Co. to Camp, to the collector or any other officer of the customs. The authority to withdraw signed by Gibson, Early & Co. was presented in due course by Wylie & Wade when they desired to withdraw the goods.

Sixth.—That it was the *established and uniform usage of trade* in New York at the times of said sales and deliveries and long before for importers to make sales of imported goods which were in warehouse in bond, the purchaser on such sales assuming the payment of the duties thereon, and being allowed and credited by the seller with the amount of the duties so assumed as so much paid on account of or deducted from what would otherwise have been the purchase price, and for the seller to make delivery of said goods in bond by signing a written consent to the withdrawal of said goods by the purchaser, and it was also in accordance with such usage and custom for successive sales and deliveries of goods in bond to be made, on similar terms and in the same manner, so long as any of such goods remained in warehouse, the last purchaser withdrawing the goods under the written consent so received by him upon and as the delivery thereof, and paying the duties thereon on such withdrawal.

Seventh.—That the said custom and usage were at the times aforesaid well known and understood, and the established and settled practice of the Custom House in New York was to treat the party holding such consent for withdrawal, and him only, as the person entitled to withdraw and receive the goods on payment of the duties, and upon the payment by him of the duties remaining due thereon, and not otherwise, to issue a written permit for the actual delivery to him of said goods out of warehouse.

Eighth.—That during the period covered by the transactions hereinbefore set forth the following regulations of the Treasury Department were in force, to wit:

"ART. 442. The entry for withdrawal of merchandise from warehouse for consumption at port of original importation shall be made by the party in whose name the merchandise was warehoused, *or* by some person duly authorized for the purpose by him, and in either case shall be signed by the party making the withdrawal. This entry shall exhibit the marks and numbers of the packages, the description and quality of the goods, and the dutiable value

of the same. On presentation to the proper officer in the collector's office, it shall be compared with the record on the warehouse books of the original warehouse entry, and if found correct, be properly entered therein, the warehouse bond number endorsed thereon, and the *amount of duties payable estimated.* From the collector's office it shall then be taken by the importer to the naval office, where a *similar comparison* shall be made with the warehouse records of that office, and the *estimate of duties verified and endorsed* upon the duplicate entry. *The amount of duties thus ascertained having been paid,* a permit will be issued for the delivery of the goods." (Here follows the form in which the entry shall be made.)

"ART. 443. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper, and other articles bought and sold by weight, when withdrawn for export or transportation, must be entered for such destination at the actual quantities on which duties were estimated at the time of arrival in the United States, and to secure this, weighers, measurers and gaugers will be required to mark on each package its contents as determined by them on its entry for warehouse. *On these quantities,* the duties on export and transportation *entries will be estimated.* Goods withdrawn for consumption may be taken at *average valuations, care being had that* on the last withdrawal the entire *balance of duty be collected.*

"ART. 444. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount to close the sum due on the warehouse entry, the *excess,* if any, shall be *refunded on the last withdrawal for consumption,* and the deficiency, if any, collected on amendment to said entry."

(Here follows the form of the permit to deliver for consumption, which must be countersigned by the naval officer.)

Ninth.—That on the fourth day of September, 1865, when the said Wylie & Wade, as brokers of the said Hugh H. Camp as aforesaid, made the withdrawal entry of the resi-

due of said sugars, viz.: J. M. R. fifteen hhds. and thirty tierces; La Fe one hundred and ninty-seven hogsheads and one tierce; A. M. thirty-three hogsheads and twenty-six tierces, the weight of said sugars so entered for withdrawal was 361,996 pounds, and that the amount of duty due the United States thereon was, at the rate of three cents per pound, the rate then fixed by law, ten thousand eight hundred and fifty-nine dollars and eighty-eight cents; that nevertheless the said collector *demanded from said* Wylie & Wade, as the duties thereon, *only the sum of $9,352.89,* being at the rate of three cents per pound upon 311,763 pounds and *no more,* and *delivered* the said goods to them without exacting or claiming the further sum of *$1,506.99,* which was in fact due upon said goods, and that the said goods so withdrawn by and delivered to Wylie & Wade were at the time of much *greater value than* the whole amount of the duties chargeable thereon, and upon the payment by said Wylie & Wade of the aforesaid amount of *$9,352.89* and no more, the said *collector and naval officer voluntarily* and without the *knowledge or consent of said Grinnell, Minturn & Co. signed and issued to said* Wylie & Wade *the permit for the withdrawal* of said goods whereby they procured the delivery of the same to themselves.

Tenth.—That the *said* Grinnell, Minturn & Co. had no notice or knowledge of said final withdrawal of said sugars, or that the same had been so permitted to be withdrawn, or had been delivered to the parties withdrawing the same without exacting the full amount of duties due thereon, or that the said sum of $1,509.66 or any sum whatever remained due to the United States for duties upon said sugars until the *sixth day of December, 1867,* when notice of such balance remaining unpaid was served upon them by the collector.

Eleventh.—That the said Wylie & Wade had become and were insolvent, before such notice was received by said Grinnell, Minturn & Co., and the said Gibson, Early & Co.

had become and were insolvent before the trial of this action.

Twelfth.—That there still remains due to the United States for duties which should have been collected from the parties who made the said final withdrawal of said sugars the sum of $1,509.66, with interest from the fourth day of September, 1865, amounting at this date to two thousand one hundred and sixteen dollars and eighty-five cents; and upon the above facts I find, as

CONCLUSIONS OF LAW.

First.—That the facts above found constitute no bar to a recovery by the plaintiffs against the defendants as principals on the bond sued on.

Second.—That if the defendants are to be regarded as sureties after the transfer of the title to the property in bond, instead of principals, they stand in no better position; for,

Third.—The laches of the Custom House officers in delivering the goods without collecting the whole of the duties cannot affect the plaintiffs, as the United States are never bound by the laches of their agents; nor can the defendants set up such laches as a discharge of the obligation which they have entered into. Judgment must therefore go for the plaintiffs.

Rec., pp. 8–12.

The exceptions, to raise the questions stated in the "assignments of error," were duly taken at the trial.

Rec., pp. 21–23.

ASSIGNMENTS OF ERROR.

First.—That the court refused to find and decide as matter of law—

That under the facts proved in this case the plaintiff is not entitled to recover from defendants, upon the warehouse

bond or otherwise, the amount of the balance claimed to be remaining unpaid, or any part thereof.

Second.—That the court refused to find and decide as matter of law—

That by means of the voluntary delivery by the collector of the last installment of the sugars to Wylie & Wade, under the consent which had been given by Grinnell, Minturn & Co. to Gibson, Early & Co. for the withdrawal of the goods without exacting or requiring the payment of the duties chargeable thereon, and by the voluntary surrender of the lien of the United States upon the goods for the duties, the liability of the defendants as sureties for the payment of such duties was discharged.

Third.—That the court refused to find and decide as mat ter of law—

That the plaintiffs having in their hands the sugars as security for the payment of duties, and which were in value more than sufficient to pay them, cannot, after their voluntary delivery thereof to Wylie & Wade without exacting the duties, as the laws and usage required, have recourse to the warehouse bond of the defendants for such duties.

Fourth.—That the court refused to find and decide as matter of law—

That after the sale of the sugars in bond by the plaintiffs, and the delivery thereof by them to the purchaser, by their written consent to the withdrawal upon the original warehouse entry, the plaintiffs were not entitled to relinquish their custody of and lien upon the goods, which might have been made effectual for the payment of the duties, without the consent of the defendants, or without by so doing discharging them from their liability for such duty.

Fifth.—That the court refused to find and decide as matter of law—

That after the sale and delivery of the goods in bond the defendants were but sureties for the payment of the duties, and the plaintiffs were bound to look first to the goods

themselves and to the parties withdrawing them for the same, and could not recover against the defendants without showing that they had exhausted their lien upon the goods, and that they were insufficient in value to pay the duties.

Sixth.—That the court refused to find and decide as matter of law—

That a private creditor, standing in the same relation to the goods and to the defendants as the plaintiffs did, could not have voluntarily surrendered the goods which had been placed in his hands as security for the payment of the debt, and which were available for that purpose, otherwise than by the consent of the defendants, without discharging them; and that the United States, by so doing, have discharged them, and are entitled to no higher or other rights than a private creditor would be in the same case.

Seventh.—That the court refused to find and decide as matter of law—

That the defendants' consent to the withdrawal of the goods by Gibson, Early & Co. must be deemed, not a consent to their unconditional delivery, or to delivery without the payment of duties, but only to their withdrawal from warehouse in the manner and upon the terms and conditions prescribed by law and by the Treasury regulations and by usage, viz., upon the payment of all duties thereon, and such duties having been first paid, and not otherwise.

Eighth.—That the court refused to find and decide as matter of law—

That the question in issue is not a question of laches, but as to the legal effect of the actual delivery of the goods by the collector without first requiring payment of the duties for which they were held.

Ninth.—That the court found and decided as matter of law—

That the facts found constitute no bar to a recovery by the plaintiffs against the defendants as principals on the bond sued on.

Tenth.—That the court found and decided as matter of law—

That if the defendants are to be regarded as sureties, after the transfer of the title to the property in bond, instead of principals, they stand in no better position.

Eleventh.—That the court found and decided as matter of law—

That the laches of the Custom House officers in delivering the goods without collecting the whole of the duties cannot affect the plaintiffs, as the United States are never bound by the laches of their agents, nor can the defendants set up such laches as a discharge of the obligation which they have entered into.

Twelfth.—That the court found and decided as matter of law—

That judgment must go for the plaintiffs.

Rec., pp. 24–25.

All the exceptions and the assignments of error tend to the single issue, which is one of law upon undisputed facts, to wit: Whether the defense made out, which would be good against a private plaintiff, fails as a defense against the United States, because of the plaintiffs' *sovereignty* excepting it from the rules of law which would otherwise govern the case.

POINTS.

First Point.—As a part of the system, by which credit was no longer given by the United States for duties on imports, the scheme of lawful deposits in warehouse for the period fixed by the statute, subject to withdrawal for consumption *only on payment of duties*, was introduced.

This scheme was in the interest of commerce, primarily, though the Government's revenues, derivable from com-

merce, were necessarily enhanced by a measure so valuable to the steadiness and the facility of importations and of domestic exchanges of merchandise in warehouse.

Indeed, it may be doubted whether the high duties which it has been and is the policy of the United States to impose, could be supported except on the plan that the duty need be exacted only at the time of, and from the person making, the entry for consumption.

Thus, the importer, in the act of importation, was relieved from the great investment of capital which would have been absorbed in the immediate payment of duties in bulk, and could sell, as if in his own warehouse, at a less price, and in convenient parcels, when and as the consumption of the country demanded the merchandise.

The system, as regulated by the Government, and as conformed to by the usages and conveniences of domestic trade, effected these commercial and revenue advantages in a manner safe to all interests, and yet so as to facilitate, not impede, the circulation of trade, foreign and domestic, which was the motive of the whole contrivance.

For principal statute provisions see

Rev. St. U. S., §§ 2962, 2964, 2970, 2987, 2989.
Treas. Regulations, Art. 442, 443, 444.
Rec., pp. 20–21.

Second Point.—The effect of this system was that the United States assumed to treat the possession of the merchandise as the primary, and, in the absence of disaster to it or depreciation, the sufficient, security for the duties.

The United States came under obligations to acknowledge and facilitate the honest transfers of commerce, to settle with the purchaser in bond for his *quantum* of interest in the merchandise, to compute and exact the *quantum* of duty, and not to deliver except upon its payment.

In a word, the United States recognized the change of title and interest accomplished by a sale in bond, recognized

the transferred authority to take the merchandize into consumption, and by so doing recognized the condition imposed by the importer, assumed by the purchaser, created by law, and indispensable to this cherished faculty of trade, *that the delivery for consumption must be attended with the payment of duty.*

Third Point.—The rule of law, under which this honest and useful system of trade finds its practical value and protection is, that the vendor, after his sale, becomes a surety only for the sufficiency of the merchandise to pay the duty by its value, if resorted to by the United States for that purpose. That the United States, no less, in adopting and regulating the system, submits to the supervision of it, and to the just and equitable administration of it.

Thereupon, in such predicament, when the United States parts with the merchandise upon the payment as exacted, and complied with by the vendee, the recourse against the importer is gone.

Any other judicial treatment of the question requires the importer to retain the supervision of the transaction of the duties up to the final dealing by the United States with the remotest vendee.

This would require the vendor to hamper the sale with inconsistent and unmanageable conditions, or, in other words, would break up the whole system of sale in bond as founded and regulated by the Government, and annul the advantages to commerce and the revenue intended by the warehouse system and experienced from it.

Fourth Point.—As it is indisputable that the law, as between private parties, would exonerate the defendants below on their bond, the objection of the United States of

their privilege to the contrary remains only to be considered.

It is settled upon the decisions, that whatever of exemption may be accorded to the United States as respects *laches*, or lapse of time, or whatever else, "is founded not in the notion of *extraordinary prerogative*, but upon a great public policy."

Accordingly, the dealing by the Government, through its officers, with the subject-matter, which would discharge a surety, if a private person were the creditor or obligee, discharges a surety to the United States.

See U. S. *vs.* Tillotson, 1 Paine C. C. R., 305, 329.
U. S. *vs.* Hillegas, 3 Wash. C. C. R., 70.
U. S. *vs.* Kirkpatrick, 9 Wheat., 735.
Dox *vs.* P. M. Gen'l, 1 Pet., 318.
U. S. *vs.* Van Zandt, 11 Wheat., 184.

Upon the general doctrine of the discharge of a surety by the creditor dealing with the security, or the debtor, to the surety's prejudice, see

3 White & Tudor, L. Cas. Eq., p. 552.
Ludlow *vs.* Simonds, 2 Car. Cas., 1, 29.
Miller *vs.* Stewart, 9 Wheat., 680, 702.

Fifth Point.—The early cases, relied on by the Government, which arose under the system of *credit duties*, where the Government, as a matter of course, parted with the merchandise upon the *credit* as fixed by statute, are not applicable to the system of *cash duties*, and the warehouse scheme accommodated thereto.

Those cases simply hold that, the debt and debtor being ascertained by the statute, the officers of the Government, by delivering the merchandise upon an obligation not justified by the statute, did not release

the debt for the duties of the importer, which the law had fixed.

In this there was no hardship, for the dealing with the merchandise by the importer was always subject to the conditions of the law, that the *credit* given by the Government was to him and him only, making it his duty to protect himself, in respect of his own debt, if he sold the merchandise duty unpaid.

But under the system of *cash duties*, the importer knows that credit is not given to anyone; and that under the warehouse scheme the Government undertakes to deliver *only on payment of duties*.

This distinction brings the case within the principle of the cases which hold the United States to the consequences of their officers dealing with the relation of suretyship, according to the wise and equitable rules of the law.

Last Point.—The judgment below should be reversed, and a new trial ordered with direction to give judgment against the United States.

WM. M. EVARTS,
Of Counsel..

16437

OFFICE SUPREME COURT U.S.
FILED
DEC 6 1882
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

JOHN W. MINTURN ET AL.
vs.
THE UNITED STATES. } No. 121.

BRIEF FOR THE UNITED STATES.

16437

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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

JOHN W. MINTURN ET AL
vs.
THE UNITED STATES. } No. 121.

BRIEF FOR THE UNITED STATES.

This is an action of debt on a warehouse bond brought by the United States against John W. Minturn and others, survivors of the late firm of Grinnell, Minturn & Company as *principals*, and R. M. Clark as *surety*.

The bond is in the penalty of $47,575.98, and subject to the condition that Grinnell, Minturn & Co., who had imported certain sugar and stored the same in a public warehouse, should withdraw the same within a year and pay the duties thereon, or within three years and pay the duties with ten per cent. added, or withdraw the same for exportation or for transportation in bond to some port on the Pacific coast within three years.

The breach assigned is that none of these alternative conditions has been performed, and, as a consequence, that the duties on the sugar, amounting to $23,789.99, remain unpaid. (R., pp. 1–4.)

The defendants pleaded *non est factum*, with notice of special matter, and payment. (R., pp. 5–7.)

The whole matter of law and fact was submitted to the court (R., p. 8), which made a special finding (R., pp. 8–12), upon which arise the questions to be considered on this writ of error.

SUMMARY OF THE COURT'S FINDING.

Grinnell, Minturn & Co., a few days after the sugar was stored in bond, sold the whole of it to Gibson, Early & Co., subject to duty, and they, after withdrawing a large part of the sugar, with the consent in writing of Grinnell, Minturn & Co., first paying the duties on it, sold the residue to one Hugh N. Camp, to whom it was delivered on his paying the amount of the duties demanded, which, however, was less than the amount due by $1,506.99, of which, however, Grinnell, Minturn & Co. had no notice or knowledge.

The value of the sugar so delivered to Camp was much greater than the whole amount of the duties chargeable thereon.

Upon this state of facts the court gave judgment for the plaintiff for the unpaid duties, with interest and costs amounting to $3,096.11.

ARGUMENT.

The law governing this case is that which the parties themselves have made by their contract, the bond.

The condition of the bond is that it shall be of full force and effect unless Grinnell, Minturn & Co. *or their assigns* should pay the duties on the sugar on withdrawal from store, if not withdrawn for exportation or transportation to some port on the Pacific coast, and

the breach assigned is that the sugar was withdrawn otherwise than for exportation or transportation to the Pacific coast, without payment of the full amount of duties. This is the contract between the parties, which cannot be varied, to which nothing can be added, and from which nothing can be subtracted. (3 How., 578, U. S. *v.* Prescott; 2 Wall., 1, Dermott *v.* Jones; 13 Wall., 655, Osborn *v.* Nicholson.)

It is a contract the intention of which was to protect the government against every casualty or event which might prevent the collection of the full amount of duties due on the sugar upon its valuation at the time it went into store. It makes no difference, therefore, whether the last withdrawal of sugar without full payment of the duties was the result of fraud or negligence, the obligors in the bond are equally liable. Grinnell, Minturn & Co. and their surety, Clark, have solemnly stipulated with the government that they will be answerable for the payment of the full amount of duties upon the withdrawal of the sugar from store, whether by themselves *or their assigns.* The *casus fœderis* is established by showing that the sugar has been withdrawn otherwise than for exportation or transportation to the Pacific coast without full payment of the duties. No defense short of actual payment or an act of Congress remitting the duties can be available without interpolating into the contract an element which the parties did not put there.

But it is said that the moment Grinnell, Minturn & Co. sold the sugar in store to Gibson, Early & Co., their relation to the government became changed from that of principal debtors to that of sureties.

This contention necessarily involves the admission

that at the time the bond was executed Grinnell, Minturn & Co. were none the less principal debtors, because the sugar was then held by the government as security for the duties on it.

The cases are numerous where the principal debtor has been held to occupy the relation of surety to his creditor, to the extent of property he had placed in the creditor's hands to be applied to the satisfaction of the debt, and to be discharged to the extent of any impairment of the value of such property caused by the creditor's default.

No doubt this doctrine would have been invoked here but for the fact that the terms of the contract exclude it, Grinnell, Minturn & Co. having contracted, as principals, *nominatim*.

The claim of suretyship set up by Grinnell, Minturn & Co. amounts to this, that although they were in every sense principal debtors for duties on property of theirs held by the government as security for such duties, an entire change of their relation to the government has been brought about by a contract between them and Gibson, Early & Co., to which the government was in no sense a party, and of the existence of which it was not deemed important to give the government notice. (R., p. 9.)

In all the cases where the principal debtor has been held to become a surety *quoad* property placed by him in the creditor's hands, 'tis by virtue of the creditor's *consent* to undertake the trust of applying the property to the debt that this change of relation towards the debtor took place. But we have yet to see the case in which it has been held that a principal debtor was transformed into a surety by means of a collateral agreement to

which the creditor was not a party. If such a case exists, it would seem to be a solecism in jurisprudence.

In the case at bar, so far from the debtors having placed the property in the hands of government, it was *there already* by operation of law, as security for the duties, and the sale to Gibson, Early & Co. caused *no change whatever in the relation of the government to the property*, which remained just as much at the risk of Grinnell, Minturn & Co. after the sale as before.

If, then, there was a supervening equity changing the principal debtors into sureties, 'tis difficult to understand on what basis of fact that equity rests.

As to the sugar last withdrawn from store by the agents of Camp, which was chargeable with the unpaid *residuum* of duties, the relation of Grinnell, Minturn & Co. towards it *had never changed*, the law being clear that goods in warehouse shall be subject to the "order" of the importer, owner, or consignee "*upon payment of the proper duties and expenses*," as ascertained on entry for warehousing (9 Stats., p. 53, act 6th Aug., 1846). The failure to pay the duties on this *residuum* prevented the sale to Gibson, Early & Co. from being operative as to it, the title remaining in Grinnell, Minturn & Co.

It should be remembered that the warehousing system is in derogation of the rights of the government and for the ease and benefit of importers, and it is not to be presumed that it was the intention of Congress that anything short of a remission of duties or of payment of them, *in any and every event*, should discharge the bond required by law when goods go into store.

But supposing the contention that Grinnell, Minturn & Co. were sureties *quoad* the sugar to be founded, it is a familiar principle that the fraud or negligence of the

officers of the government cannot have the effect of discharging a surety from a liability or duty to the government, as was held by the learned judge of the court below (*vide* his opinion in vol. 21, Int. Rev. Rec., p. 182; also 9 Nh., 720, U. S. *v.* Kirkpatrick; *ib.*, 184, U. S. *v.* Van Zandt; 1 Pet., 326, Don *v.* Postmaster-General).

It is submitted that the judgment must be affirmed.

WM. A. MAURY,
Assistant-Attorney General.

16445

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 110.

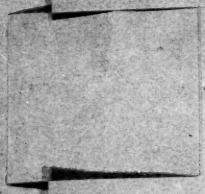
ROBERT P. DODGE, APPELLANT,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 20, 1879.



SUPREME COURT OF THE UNITED STATES.

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1 *Bill of complaint.—Filed May* 17, 1873.

In the supreme court of the District of Columbia, this 17th day of May, A. D. 1873.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY, complainant,
vs.
ROBERT P. DODGE, PHILIP A. DARNEILLE, Frederick W. Jones, William L. Dunlop, and Emilie M. Darneille, def'ts.

No. 3217. Equity. Docket 12.

To the judges of the supreme court of the District of Columbia:

The Freedman's Savings and Trust Company brings this its bill against Robert P. Dodge, Philip A. Darneille, Frederick W. Jones, William L. Dunlop, and Emilie M. Darneille, and thereupon complains and says as follows:

First. The complainant is a corporation duly organized under and in pursuance of an act of Congress entitled "An act to incorporate the Freedman's Savings and Trust Company," approved March 3d, 1865, and acts amendatory thereof, and doing business in the city of Washington, in the District of Columbia, by virtue of said authority.

Second. The said defendants are residents of the said District of Columbia, and the said defendant Emilie M. Darneille is the wife of the said Philip A. Darneille.

Third. On the nineteenth day of January, 1869, the said defendant Robert P. Dodge, being indebted to one Benjamin Darby in the sum of thirteen thousand dollars ($13,000), made and delivered to said Darby three certain promissory notes, bearing date on said 19th day of January, 1869, payable, with interest, twelve months after the date thereof, to the order of Benjamin Darby, one of said notes being for the sum of two thousand dollars, and one for four thousand dollars, and the third for the sum of seven thousand dollars. And to secure the payment of the said promissory notes the said Robert P. Dodge and Caroline H., his wife, duly executed and delivered to the defendants Frederick W. Jones and Philip A. Darneille a certain deed, bearing date on the 19th day of January, 1869, whereby the said grantors conveyed to said Jones and Darneille, in trust, certain parcels of real estate situated in the city of Georgetown, in said District, and particularly described as follows:

I. For the first parcel of real estate, beginning on the south side of Water street and at the end of a line drawn westerly on said street from the southwest corner of High and Water streets one hundred and thirty feet and six inches, and running from thence westerly twenty-five feet and six inches; thence running southerly and parallel with High street seventy-six feet; thence running westerly and parallel with Water street fourteen feet; thence southerly and parallel with High street to the channel of the Potomac River; thence easterly and parallel with Water street twenty-five feet and six inches; thence northerly and parallel with High street to the point distant seventy-six feet south from Water street; thence easterly and parallel with Water street fourteen feet, and thence by a straight line to the beginning; together with the free and uninterrupted use and right of, in, and to fourteen feet of ground fronting on the south side of Water street and adjoining the above-described parcel of ground and premises, and heretofore and now used as an alley, being the ground and premises which were conveyed to the

late Frances Dodge by Jeremiah Orme, by deed dated the 25th day of July, A. D. 1850, and recorded among the land records for said county and District, in liber J. A. S. No. 15, folio 370, with the warehouse thereon and wharf attached thereto.

II. For the second parcel of real estate, beginning at a point on the west side of Montgomery street distant one hundred and twenty feet south from the corner formed by the intersection of the south line of Stoddard street with the west line of Montgomery street, and from thence running south on said Montgomery street thirty-nine feet; thence running westerly and parallel with Stoddard street one hundred and twenty feet; thence northerly and parallel with Montgomery street thirty-nine feet; and thence easterly and parallel with Stoddard street one hundred and twenty feet to the place of beginning, with the dwelling-house and other improvements thereon.

III. And for the third parcel of real estate, beginning at a point on the east side of Congress street distant three hundred and seven feet and six inches from the corner formed by the intersection of the east line of Congress street with the south line of Road street, and running thence southwardly by and with the eastern line of Congress street sixty-nine feet and six inches; thence easterly by and with the southern boundary line of the premises conveyed by Harriett Williams to Washington Beck, by deed dated June 24th, A. D. 1835, and recorded in the same land records, in liber W. B. No. 56, one hundred and twenty-seven feet; thence northerly sixty-seven feet and six inches to the south line of an alley fourteen feet in width, opening into Road street, and laid out for the use of the premises now being described, and other parcels of ground binding on said alley; and thence running westerly one hundred and twenty-seven feet to the place of beginning, with the dwelling-house and other improvements thereon.

Fourth. The said deed of trust authorized, empowered, and made it the duty of the said trustees, Frederick W. Jones and Philip A. Darneille, upon any default being made in the payment of any or either of the said promissory notes, and upon the request of the holder of any or either of said notes then due and not paid, to sell the said real estate, or so much thereof as might be necessary, and out of the net proceeds arising from such sale to pay to the holder or holders of said notes the amount that might then remain unpaid thereon; and the said deed of trust also authorized the said trustees, upon the full payment by said Robert P. Dodge of the said notes, interest, insurance, and other costs and charges specified in said deed, and not otherwise, to release and reconvey the said real estate to the said defendant Robert P. Dodge. All of which will more fully and at large appear by the said deed of trust, which was duly recorded in liber No. 5, folio 476, of trusts and releases, one of the land records of the District of Columbia, a true copy of which is herewith filed, marked Exhibit A, and referred to as part of this bill.

Fifth. The complainant is informed and believes, and therefore charges, that the said Frederick W. Jones and Philip A. Darneille fully accepted the trusts reposed in them by the said deed, and agreed to perform the duties imposed by the same.

Sixth. The said promissory notes herein mentioned and described were duly indorsed in blank by the said Benjamin Darby, and were afterwards, for a valuable consideration, sold and delivered to the said complainant, the Freedman's Savings and Trust Company, and
2 the said promissory notes have ever since been and now are owned and held by the said complainant.

Seventh. On the 19th day of January, 1871, as complainant is informed and believes, the sum of eight hundred and twenty-seven dollars and nineteen cents ($827.19) was paid to the complainant by the said Robert P. Dodge, or his duly authorized agent, for interest on the said promissory notes, and on the eighth day of February, 1872, the further sum of eight hundred and twenty-seven dollars and nineteen cents ($827.19) was paid to the complainant by the said defendant Dodge, or by his duly authorized agent, for interest on the said promissory notes; and, except the said interest, no other or further sum has ever been paid on the said notes, and the whole thereof (except the said interest so paid) is due from the said defendant Robert P. Dodge to the complainant.

Eighth. On or about the 22d day of July, 1871, as the complainant is informed and believes, the said trustees, Frederick W. Jones and Philip A. Darneille, unlawfully, and in violation of the trust reposed in them by the said deed of trust, executed and delivered to the said defendant Robert P. Dodge a deed of release, in due form, bearing date December 31st, 1870, whereby they attempted to release from the operation of the said deed of trust and to reconvey to the said Dodge the parcels of real estate hereinbefore firstly and secondly described, and the said release was so executed and delivered without the authority, knowledge, or consent, and in fraud of the rights of, the said complainant, it being at that time the owner and holder of the said promissory notes; which said deed of release was recorded in liber 652, folio 254, one of the land records of the District of Columbia, and a true copy thereof is herewith filed, marked Exhibit B, and referred to as part of this bill.

Ninth. The complainant is informed and believes, and therefore charges, that the said Robert P. Dodge procured the execution and delivery of the said release by the said trustees, well knowing that the said promissory notes were then due and wholly unpaid.

Tenth. The said parcel of real estate hereinbefore thirdly described and not mentioned in said deed of release is not of sufficient value, as the complainant is informed and believes, to pay the amount still due on the said promissory notes.

Eleventh. On the 15th day of March, 1872, the said defendants Robert P. Dodge and wife, as complainant is informed and believes, executed in due form of law, and delivered to the defendant Philip A. Darneille, a deed in fee, dated on said day, for the alleged consideration of $5,250.00, whereby he conveyed to said Darneille the real estate hereinbefore secondly described, together with other real estate; which deed was recorded in liber 676, folio 264, of the land records of said District; and afterwards, and on or about the 15th day of August, 1872, the said defendant Philip A. Darneille, by a deed duly executed and delivered, conveyed to the defendant William L. Dunlop the said real estate hereinbefore last referred to, in trust for the benefit of the defendant Emilie M. Darneille, the wife of the said Philip A. Darneille, which said deed was recorded in liber 692, folio 185, of said land records. The complainant is informed and believes, and therefore charges, that the said trust deed to William L. Dunlop was voluntary and without valuable consideration. And the complainant is advised and believes, and therefore charges, that the two deeds last hereinbefore mentioned are void and of no effect as against this complainant.

The said complainant therefore prays:

1. That the said deed of release executed and delivered by the said trustees, Frederick W. Jones and Philip A. Darneille, to the defendant Robert P. Dodge be declared and decreed to be null, void, and of no effect as against the complainant.

2. That the deed in fee, made by the defendant Robert P. Dodge to the defendant Philip A. Darneille, bearing date on the 15th day of March, 1872, and also the deed of trust made by the said defendant Philip A. Darneille to the defendant William L. Dunlop, bearing date on the 15th day of August, 1872, be and that each of them be declared null, void, and of no effect, so far as they, or either of them, relate to any of the parcels of real estate mentioned and conveyed in said deed of trust dated on the 19th day of January, 1869, and so far as they, or either of them, affect or relate to the rights and interest of the complainant.

3. That the three parcels of real estate mentioned in this bill, and conveyed to said defendants Frederick W. Jones and Philip A. Darneille, in trust, by said trust deed dated January 19th, 1869, together with all easements, appurtenances, and improvements appertaining thereto, be sold under the decree of this court, and that out of the proceeds arising from such sale the amount due to the complainant on the said three promissory notes be paid.

4. That the complainant may have judgment against the said defendant Robert P. Dodge for the amount due upon said promissory notes, and that the complainant may have execution thereof as at law.

5. That the said defendants Frederick W. Jones and Philip A. Darneille may be decreed to pay to the complainant all loss and damage to it resulting from or occasioned by the unlawful execution and delivery of the said deed of release to the defendant Robert P. Dodge.

6. That the complainant may have such other and farther relief in the premises as may be agreeable to equity and good conscience.

THE FREEDMAN'S SAVINGS & TRUST CO.,
By GEO. W. STICKNEY, *Actuary.*

JNO. H. COOK, *Solicitor for Pl'tf.*
ENOCH TOTTEN, " " "

DISTRICT OF COLUMBIA, *ss:*

I, George W. Stickney, being first duly sworn, do depose and on my oath say that I am the actuary of the above-named complainant; that I have read the above bill of complaint, and know the contents thereof; and that the facts therein stated positively are true, and that the facts therein stated upon information and belief I believe to be true.

GEO. W. STICKNEY.

Subscribed and sworn to before me this 17th day of May, 1873.
R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Assistant Clerk.*

3 *Summons to answer.—Issued May* 17, 1873.

In the supreme court of the District of Columbia, May 17th, 1873.

THE FREEDMAN'S SAVINGS & TRUST CO., compl't, *against* ROBERT P. DODGE ET AL., DEFENDANTS. } No. 3217. Equity. Docket 12.

The President of the United States to Robert P. Dodge, Frederick W. Jones, William L. Dunlop, and Philip A. Darneille & Emilie M., his wife, defendants:

You are hereby commanded to appear in this court at its first special

term occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

Marshal's return.

Summoned all.

A. SHARP,
Marshal.

MAY 17, 1873.

Answer of Robt. P. Dodge.—Filed June 20, 1873.

Supreme court, Dist. of Columbia.

THE FREEDMAN'S SAVING AND TRUST COMPANY *vs.* ROBERT P. DODGE. } Answer of Robert P. Dodge. 3217. Equity. Docket 12.

1. I admit the incorporation of the complainant as averred.

2. I admit the averments of paragraph No. 2.

3. I admit the execution and delivery of the promissory notes and deed of trust as alleged.

4. I admit the copy marked Exhibit A, filed with the bill of complaint, to be a true copy of the deed of trust, and refer thereto for the contents of said deed.

5. I admit that Jones and Darneille accepted the trusts of said deed.

6. I do not know and cannot admit that said promissory notes were endorsed in blank by Benjamin Darby and sold and delivered to complainant for a valuable consideration, and have ever since been and are now owned by complainant.

But I deny that said notes were ever so sold and assigned before their maturity or until they were overdue, paid, and satisfied. And I further state the history of said notes as follows:

In February, 1869, about a month after my purchase from Benjamin Darby of the property on Congress street, being the third piece described in the bill, I leased the same to Wm. S. Huntington for six
4 months, at a certain rent payable monthly. He paid the rent monthly until August of the same year, when he agreed to purchase the property for the amount of my note, secured as stated in the bill, and to pay for the same by taking up said notes at maturity. He thereupon ceased to pay rent, the property was transferred to him on the tax-books, and he paid the taxes thereafter accruing. In January, 1870, on the day when my notes fell due, he sent to me to inquire where the notes were. I sent to him the bank-notices received by me, and thereupon he paid the notes and shewed them to me in his hands as paid.

The conveyance by me to him not having been prepared, I did not demand possession of the notes at that time. I subsequently repeatedly offered to complete the transaction by executing a deed, and asked him to deliver my notes, but was put off by him with various excuses;

which conduct I attributed to his absorption with other business and his disposition to trifle. Desiring to have the other pieces of property embraced in the deed of trust released, I caused such a release to be prepared, dated December 31, 1870, and also a deed from myself and wife to said Huntington, bearing the same date. It was not, however, until July, 1870, that I could get his attention to the mater, and on the 22d of that month he wrote an order to the trustees to execute said deed of release, and it was accordingly done. It will therefore be seen that if said notes were ever transferred to said complainant, it was after they were overdue and paid and said deed of trust was satisfied and discharged.

7. I wholly deny that I ever paid to complainant any sum whatever for interest on said notes, either directly or through an agent, and for the reasons already stated deny that anything is due on said notes.

8. I admit that a deed of release was executed as alleged, by the trustees, Jones and Darneille, but deny that it was done unlawfully as in violation of their trust. I do not know whether it was done without the knowledge of the complainant, but do not admit that they then held said notes, and require proof of the fact, if it be material.

9. I wholly deny the averments of paragraph No. 9.

10. I do not know and cannot admit that the property not released is insufficient in value to pay the amount of said notes with interest.

11. I admit the conveyances alleged from me to Darneille, and from said Darneille to Wm. L. Dunlop, but deny that they are void and of no effect as against the complainant.

And having fully answered, I pray to be hence dismissed with my reasonable costs, &c.

ROBT. P. DODGE.

I, Robert P. Dodge, do solemnly swear that I have read over the answer above subscribed by me, and that the matters therein stated of my personal knowledge are true, and those stated on information and belief I believe to be true.

ROBT. P. DODGE.

Sworn to and subscribed before me this nineteenth day of June, 1873, at Washington.

[SEAL.] GEO. C. THOMAS,
Notary Public.

Replication.—Filed Sept. 10, 1873.

FREEDMAN'S SAVINGS & TRUST CO. *vs.* ROBERT P. DODGE & OTHERS. } 3217. Equity.

The said complainant joins issue with the said defendant Dodge upon his answer.

ENOCH TOTTEN,
Counsel for Compl't.

5 *Decree dismissing bill.—Filed Mar.* 12, 1874.

Supreme court of the Dist. of Columbia.

FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* R. P. DODGE ET AL. } 3217. Equity. Docket 12.

This cause coming on to be heard on the pleadings and evidence, and

having been heard and considered, it is by the court, this 12th day of March, A. D. 1874, ordered, adjudged, and decreed that the bill be dismissed with costs.

And from this decree complainant, by its counsel, prays an appeal, which is allowed, provided it give security, under the rule, for the payment of costs in $50.

By the court.

A. WYLIE.

Appeal to the gen. term.—Filed Mar. 13, 1874.

In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* ROBERT P. DODGE ET AL. } 3217. Equity. Docket 12.

The said complainant hereby appeals to the general term from the decree rendered at the special term on the 12 day of March, 1874.

ENOCH TOTTEN,
Sol'r for Pl'ff.

6 *Decree in gen. term.—Filed July* 8, 1874.

In the supreme court of the District of Columbia, in general term, July 8, 1874.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* ROBERT P. DODGE ET AL. } 3217. Equity. Docket 12.

This cause having come on to be heard in general term, on appeal from the decree rendered in special term, and having been argued by counsel, it is, this 8th day of July, 1874, ordered, adjudged, and decreed as follows, to wit:

First. That the said decree rendered in special term be, and the same is hereby, reversed.

Second. That the lots and premises on Congress street, in the city of Georgetown, described in the bill and known as the "Huntington property," be sold under the decree of the court, and that the proceeds be applied towards the payment of the amount due on the three promissory notes mentioned in the bill of complaint made by defendant Dodge.

Third. That if there be not sufficient funds derived from the sale of said "Huntington house" to pay the said notes, interest, and costs, then, in that case, the deed of release executed and delivered by the defendants Frederick W. Jones and Philip A. Darnielle to the defendant Robert P. Dodge, bearing date December 31st, 1870, and in the proceedings mentioned, shall be set aside and declared null and void, and the deed executed and delivered by said defendant Dodge to the defendant Philip A. Darneille, dated the 5th day of March, 1872, shall be set aside and declared null and void so far as the same relates to the property mentioned and described in the proceedings in this cause. And that the deed of trust from said Philip A Darneille to the defendant William L. Dunlop, bearing date on the 15th day of August, 1872,

shall be set aside and declared null and void, and of no effect, so far as the same relates to any of the parcels of real estate mentioned in the said bill of complaint.

And that the said property mentioned and described in the said release from the defendants Jones and Darneille to the defendant Dodge, bearing date December 31st, 1870, shall be sold under the decree of the court (the lot last conveyed by Dodge to be sold first), and the proceeds arising from such sale shall be applied to the extinguishment of the amount due upon the said promissory notes.

Fourth. That the plaintiff have and recover of the defendant Robert P. Dodge whatever amount may remain due upon the three promissory notes mentioned and described in the bill of complaint, and made by said Robert P. Dodge, after the application thereto of the proceeds of said sales, together with the costs of this suit, and that the said plaintiff have execution therefor as at law.

D. C. HUMPHREYS,
In General Term.

And from this decree the defendants, by their solicitors, Messrs. W. S. Cox and Joseph H. Bradley, jr., here now, in open court, pray an appeal to the Supreme Court of the United States, and the same is allowed.

By order of the court.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the District of Columbia, greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between the Freedman's Savings and Trust Company, complainant, and Robert P. Dodge, Philip A. Darneille, Frederick W. Jones, William L. Dunlop, and Emilie M. Darneille, defendants, No. 3217, equity, docket 12, wherein the decree of the said supreme court entered in said cause on the 8 day of July, in the year of our Lord eighteen hundred and seventy-four, in the following words, viz:

(Here follows and is recited the said decree.)

As by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas, at the present term of October, in the year of our Lord eighteen hundred and seventy-six the said cause came
7½ on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel. On consideration thereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs; and that the said complainant, the Freedman's Savings and Trust Company, recover against the said defendants twenty dollars for its costs herein expended and have execution therefor.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Su-

preme Court, the 19 day of February, in the year of our Lord eighteen hundred and seventy-seven.

8 In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMpany *vs.* ROBERT P. DODGE ET AL. } Equity. No. 3217. Docket 12.

This cause having come on for further hearing, on the decree of the court in general term and on the decree of the Supreme Court of the United States affirming the said decree of the general term, it is, on motion of the solicitor of the complainants, this 14th day of March, 1877, ordered, adjudged, and decreed as follows:

That Enoch Totten be, and he hereby is, appointed trustee to make sale of the property in the proceedings mentioned, and he shall proceed as follows: He shall first file in the office of the clerk of this court
9 a bond to the United States in the usual form, executed by himself, with a surety or sureties to be approved by the court or one of the justices thereof, in the penalty of ten thousand ($10,000) dollars, conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree in the premises. He shall then proceed to make sale of the said premises, having first published a notice of the sale of all the said property for at least ten days in some newspaper printed in the city of Washington, with such other notice as he may think proper, of the time, place, manner, and terms of sale, which terms of sale shall be as follows: One-fourth of the purchase-money thereof to be paid at the time of the sale, or within five days thereof, in cash, and the balance
10 in three equal instalments at one (1), two (2), and three (3) years from the day of sale, the whole to bear interest from the day of sale; and he shall require a cash deposit of one hundred (100) dollars on each parcel of land when the same shall be struck off by the auctioneer, and the purchaser or purchasers of any of the said parcels of land shall have the privilege of paying cash for the same on the day of sale or on the final ratification of the sale by the court.

The said trustee shall first offer for sale and sell the parcel of land described in the proceedings, and referred to as the "Huntington house," and situated on the east side of Congress street, in the city of Georgetown, and if there be not sufficient funds derived from the
11 sale of said parcel to pay the said debt, interest and costs, then he shall next offer for sale and sell the parcel situated on the west side of Montgomery street, and being the parcel of land secondly mentioned and described in the original bill of complaint in this cause, and if there be not sufficient funds derived from the said two parcels of land to fully pay the said debt, interest, and costs, then he shall proceed to sell the remaining parcel of ground described firstly in the original bill of complaint, and being the parcel situated on Water street, in the said city of Georgetown.

As soon as may be convenient after such sale or sales, the said trustee shall report to this court a full and particular account of the same, with an affidavit of the truth thereof and of the fairness of such
12 sale or sales annexed thereto, and thereupon the cause shall be referred to the auditor to state the account of the trustee and to distribute the fund arising from such sale or sales. All the costs

and expenses of this suit, and of such sale or sales, and all the taxes, general and special, lawfully assessed upon the said property, and due and payable according to law at the time of such sale, shall be paid out of the said purchase money.

It is further ordered, adjudged, and decreed that upon the final ratification of the sale of any part of the said parcels of ground the defendants who may be in possession, or any person who has come in under them, or either of them, pendente lite, deliver possession of such parcel or parcels of ground to the purchaser or purchasers thereof on the production of a copy of the order of final ratification.

13 On the final ratification of such sale or sales by the court, and on the payment of the whole of the purchase money, and not before, the said trustee, by a good and sufficient deed to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of said property, and to his, her, or their heirs, the property to him, her, or them sold, free, clear, and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from, or under them.

And it is further ordered, adjudged, and decreed that this cause stand over until the coming in of the report of the auditor for such further or other proceeding in the cause as may be necessary and proper, after the application of the balance of the purchase

14 money to said debt, interest, and costs.

By the court.

15 In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY
vs.
ROBERT P. DODGE, PHILIP A. DARNEILLE, et al. } Equity. No. 3217.

The report of Enoch Totten, appointed trustee in the above entitled cause to make sale of property therein mentioned and described, respectfully shows as follows:

After giving bond with security for the faithful discharge of his trust, as required by the decree, and giving notice of the time, place, manner, and terms of sale by advertisement in the National

16 Republican (a daily newspaper printed and published in the city of Washington, in the District of Columbia) for more than ten days, he did, pursuant to said notice, attend on the premises at the hour of four o'clock in the afternoon of Saturday, the 26th day of May, A. D. 1877, and then and there proceeded to sell said real estate in the following manner, to wit:

In the first place he offered at public sale to the highest bidder the dwelling-house and premises as mentioned in the advertisement (a copy of which, marked Exhibit A. is hereto annexed and referred to as a part of this report), which dwelling-house and premises are known as the Huntington house and situated on Congress street, in the city of Georgetown, in the District of Columbia, and sold the same to

17 Abram H. Herr, he being then and there the highest bidder therefor, at and for the sum of $5,550.00. He has received from the said Herr the sum of $1,387.50, being the first instalment of the purchase money according to the terms of sale mentioned in the said advertisement and in the decree; and he has also received from the said Herr his three

certain promissory notes bearing date on the 26th day of May, 1877, each for the sum of $1,387.50, with interest at the rate of six per cent. per annum, payable at the Farmers and Mechanics' Bank at Georgetown, to the order of your trustee, which notes are payable in one (1), two (2), and three (3) years, respectively.

In the next place, he offered for sale, at public auction, the property secondly described in the said advertisement, and situated on
18 Montgomery street, in the said city of Georgetown, which said property he sold to Nanny B. Blackford at and for the sum of $2,000.00, she being the highest bidder, and that being the highest sum bidden therefor. The said Nanny B. Blackford has paid to your trustee the full sum of $2,000.00, and the same is in his hands ready for distribution according to such order as may be made in the premises.

In the last place, your trustee offered at public sale the property lastly described in the said advertisement, which is situated on Water street, near High street, in the said city of Georgetown, and sold the same to H. Jarboe, at for the sum of $150.00, that being the highest sum bidden, and he being the highest bidder therefor. Subse-
19 quently to the passing of the decree in this cause, your trustee ascertained that there was a prior incumbrance upon the said property last mentioned, amounting to about $1,000.00. That the said defendant Robert P. Dodge and wife, on or about the 28th day of May, 1862, being indebted unto Lucinda S. Matthews, executed and delivered a promissory note, bearing date on that day, for the sum of $1,000.00, with interest, payable quarterly, at the rate of six per cent. per annum, and to secure the payment of the said note, executed, acknowledged, and delivered a deed of trust in the usual form, bearing date on that day, by which they conveyed the said wharf property to Charles M. Matthews, which deed of trust will be found recorded in liber J. A. S. No. 218, folio 19, one of the land records of the District of Colum-
20 bia, as your trustee is informed and believes. Your trustee is informed and believes that all the interest on the said note has been paid, except, perhaps, the interest for about three months. Before the said wharf property was put up for sale by your trustee, public announcement was made that there was an incumbrance of this character upon the said property, and that the same would be sold subject thereto, and thereupon the sale was made, as before stated, subject to the said deed of trust. Whether the said incumbrance is a lawful subsisting incumbrance or not is, in the opinion of your trustee, a proper subject-matter of investigation by the auditor of this court in his report upon the distribution of the funds, but your trustee has no reason to doubt the validity of the said incumbrance.

21 The said H. Jarboe has paid to your trustee the sum of $100.00 in cash, leaving a balance due from him, provided the said incumbrance is a subsisting lien, of the sum of $50.00. And the said H. Jarboe has informed your trustee that he desires, so soon as the sale shall be confirmed by this court, to pay all the purchase money in cash, and to take a deed for the said property from your trustee. No note has, therefore, been exacted from the said Jarboe for the said sum of $50.00.

The expenses which has been incurred by your trustee in making these sales are as follows:

For publishing the advertisement of sale	$68 75
" auctioneer's fees for the three sales, $10 each	30 00
one bell-boy	1 00

22 These expenses have been paid out of the funds which came

into the hands of your trustee, and the vouchers therefor are attached to and filed with this report for such examination as may be necessary and proper in the case.

Your trustee further reports that the sales above referred to were in all respects fairly made. That every reasonable effort was made to obtain as much money as possible from the property. The weather was not unfavorable, and the bidders in attendance were numerous, many substantial men being present at the sales. The price received for the respective pieces of property are, in the judgment of your trustee, reasonable and fair, and as much as could be obtained, probably, under the most favorable circumstances. The condition of the Huntington house as to repairs is bad, and the building on the wharf prop-
23 erty, which is an old dilapidated warehouse, is, in the judgment of your trustee, of no value whatever. The other house, on Montgomery street, is a two-story wooden house, apparently in good order.

In making the sales hereinbefore reported your trustee observed, as well as he could, the rules of court on that subject as to advertising, &c.

All of which is respectfully submitted.

(Signed) ENOCH TOTTEN,
Trustee.

24 DISTRICT OF COLUMBIA,
County of Washington, ss:

Enoch Totten, being first duly sworn, doth depose and say that the matters and things stated in the foregoing report are true to the best of his knowledge, information, and belief, and that the sales therein reported were fairly made.

(Signed) ENOCH TOTTEN.

Subscribed and sworn to before me this 4th day of June, A. D. 1877.
(Signed) R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Ass't Clerk.

25 In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* ROBERT P. DODGE ET AL. } In equity. Docket 12. No. 3217.

On the 12th day of June, 1877, this honorable court passed the following order:

"1. That the report of sales as made by said trustee be, and the same is hereby, confirmed, unless cause to the contrary thereof be shown on or before the 15th day of July, 1877.

"2. That the cause be, and the same is hereby, referred to the auditor to state the account of the trustee and to distribute the fund.

"3. That the auditor examine and report upon the question
26 as to whether or not the lien claimed by virtue of the deed of trust to Charles M. Matthews, mentioned in the said report, is a valid and subsisting lien upon the said wharf property."

Therefore, in pursuance of the above reference, I, Thomas Hood, the said auditor, did on the 21st day of June, 1877, take the testimony of all the witnesses produced before me in this cause, and have appended the same to this report, reference to which is made.

The trustee in this cause reports that on the 26th day of May, 1877, he sold the property referred to in these proceedings (for a detailed state-

ment of which reference is made to Schedule A, fols. 1 & 2), in all aggregating the sum of $9,232.83, which sum includes interest on deferred notes and the lien upon the wharf property mentioned
27 herein, which I find to be a valid and subsisting lien upon said wharf property.

Schedule B is a statement of the expenses incurred herein by said trustee, vouchers for which are hereto appended.

Schedule C is a statement of the indebtedness of the defendant to the complainant, aggregating the sum of $17,225.00.

Schedule D, fol's 1 & 2, shows the distribution of the net proceeds herein, from which it will be seen that the whole of the note for $7,000.00 and interest remains due and unprovided for out of the fund herein, and that there is due $386.47 on note of $4,000.00, with no fund applicable to the payment thereof, except a note made by B. J.
28 Darneille and payable to the order of Thomas E. Waggaman, receiver, for $200.00.

All of which is respectfully submitted.

(Signed) THOMAS HOOD,
Auditor.

29 SCHEDULE A.

Trustee's account.—Enoch Totten, esq., trustee.

ACCOUNT SALES.

1877.				
May 26.	Sale of dwelling-house and premises, known as the Huntington house, situated on Congress street, in the city of Georgetown, D. C., to Abram H. Herr, he being the highest bidder therefor, at and for the sum of $5,550.00, payable ¼ cash			$1,387 50
" "	Payable ¼ note due in one year, with 6 % int. for	$1,337 50		
	Int.	83 25		
				1,470 75
	Note due in two years	1,387 50		
" "	Int. @ 6%	166 50		
				1,554 00
	Am't car'd for'd			$4,412 25

30 SCHEDULE A—Continued.

	Am't br't for'd			$4,412 25
1877.				
May 26.	Note due in three years	1,387 50		
	Int. @ 6 %	249 75		
				1,637 25
	Total cash and def'd notes			$6,049 50
" "	Sale of the property on Montgomery street, as described in the advertisement of said sale, to Mrs. B. L. Blackford, at and for the sum of $2,000.00, payable all cash			2,000 00
				$8,049 50

" "	Sale of the wharf property, described in the advertisement of said sale, situated on Water street, in said city of Georgetown, to H. Jarboe, at & for the sum of	150 00	
	Am't car'd for'd		$8,049 50

31 SCHEDULE A.—Continued.

	Am't br't for'd		$8,049 50
	Subject to a deed of trust of $1,000,00 & int. @ 10 % from Feb'y 28th, 1877, to June 4th 1877 ..... 33 33	1,033 33	
			1,183 33
	Total sales		$9,232 83

RECAPITULATION OF SALES.

	Cash, Huntington house	$1,387 50	
	Do. property on Montgomery street	2,000 00	
	Do. wharf property	150 00	
	Total cash	$3,537 50	
1878. May 26.	1st deferred note & int	1,470 75	
1879. May 26.	2nd do.	1,554 00	
1880. May 26.	3rd do.	1,637 25	
	Deed of trust assumed by H. Jarboe	1,033 33	
		$9,232 93	$9,232 83

(Signed) THOMAS HOOD, *Auditor.*

31½ SCHEDULE B.

Trustee's account—Enoch Totten, esq., trustee.

EXPENSES.

Paid National Republican		$68 75
Auctioneer 3 sales	$30 00	
Bellman	1 00	
		31 00
Court costs		78 25
Trustee's commissions on $9,232.83	$306 98	
Less auctioneer	30 00	
		276 98
Extra solicitor's fee		35 00
Auditor's fee this report		50 00
Tax-bill chargeable to the trust fund in this cause		52 05
Total expenses		$592 03

(Signed) THOMAS HOOD, *Auditor.*

32 SCHEDULE C.

Indebtedness of Robert P. Dodge.

For note dated January 19th, 1869 for the sum of	$2,000 00	
Int. at 6 % from Jan'y 24, '72, to June 24, '77, 5 y'rs 5 m's	$650 00	
		$2,650 00
For note dated Jan'y 19th, 1869, for the sum of.	$4,000 00	
Int. at 6 % from Jan'y 24, '72, to June 24, '77, 5 y'rs 5 m's	1,300 00	
		$5,300 00
Note dated Jan'y 19th, 1869, for the sum of....	$7,000 00	
Int. at 6 % from Jan'y 24th, 1872, to June 24th, '77, 5 y'rs 5 m's	$2,275 00	
		$9,275 00
Total indebtedness		$17,225 00

(Signed) THOMAS HOOD,
Auditor.

33 SCHEDULE D.

Trustee's account—Enoch Totten, esq., trustee.

DISTRIBUTION.

Total cash payments br't f'm Schedule A, fol. 2.	$3,537 50	
Am't in hands of receiver	487 97	
By expenses as per Schedule B		592 03
Note for $2,000.00 and int. br't fr'm Schedule C		2,650 00
Note for $4,000.00 and int. br't f'm Schedule C.		5,300 00
To bal. due on note of $4,000.00	4,516 56	
	$8,542 03	$8,542 03
By balance br't down		4,516 56
1878.		
May 26. " int. on $4,000.00 to May 26, '78, at 6 %		221 33
" " To 1st deferred note & int. f'm Schedule A	1,470 75	
" balance due car'd down	3,267 14	
	$4,737 89	$4,737 89

34 SCHEDULE D.—Continued.

By balance br't down		$3,267 14
1879.		
May 26. " int. on $3,267.14		196 03
To 2nd deferred pay't	1,554 00	
" balance car'd down	1,909 17	
	$3,463 17	$3,463 17
By bal. brought down		1,909 17

1880.			
May 26.	" one year's int. on $1,909.17		114 55
	To 3rd deferred note & int	1,637 25	
	" bal. car'd down	386 47	
		$2,023 72	$2,023 72
	Bal. due on $4,000.00 br't for'd		$386 47

To provide for the payment of which balance is the unsecured note of B. J. Darnielle for $200.00 & interest thereon. Besides the above balance there remains a note of $7,000.00 and interest wholly unprovided for.

(Signed) THOMAS HOOD, *Auditor.*

35 In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* ROBERT P. DODGE ET AL. } No. 3217. Eq. Doc. 12.

The defendant Robert P. Dodge, by his solicitor, respectfully moves this hon. court to rescind, vacate, and set aside so much of the decree passed in this cause on the 8th of July, 1874, as is contained in the following words, viz: "That the plaintiff have and recover of the defendant Robert P. Dodge whatever amount may remain due upon the three promissory notes mentioned and described in the bill of complaint, and made by said Robert P. Dodge, after the application thereto of the proceeds of said sales," and shows for cause of this motion that said part of the decree was erroneous, and not warranted by the pleadings and the character of this suit, and was inadvertently passed,
36 and that, being interlocutory, it may and ought to be vacated, as prayed.

(Signed) WALTER S. COX,
Solicitor for Dodge.

37 In the supreme court of the District of Columbia.

F. S. & TRUST CO. *vs.* ROBERT P. DODGE ET AL. } Eq. No.

This cause having come on to be heard, on the motion of the solicitor for the complainants for a personal judgment against the said defendant Robert P. Dodge for the balance due on his notes after the application of proceeds of the sales made by the auditor's report, it is, this 27 day of December, 1877, ordered that said motion be heard in the general term in the first instance.

By the court.

38 In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* ROBERT P. DODGE ET AL. } Equity. No. 3217.

This cause having come on to be heard in the general term, and hav-

ing been argued by counsel, it is, this 11th day of February, 1879, ordered, adjudged, and decreed that the auditor's report heretofore filed in this cause be, and the same hereby is, ratified and confirmed. And it appearing from the said auditor's report that the balance remaining due on the promissory notes mentioned and described in the proceedings in this cause, is the sum of $7,386.47, with interest, it is further ordered, adjudged, and decreed that the complainant, The Freedman's Savings and Trust Company, have and recover of and from the said Robert P. Dodge the sum of $7,386.47, together
39 with the costs of these proceedings, with interest on $7,000.00 thereof from the 24th day of January, 1872, and with interest on the sum of $386.47 thereof from the date of this decree; and that the said Freedman's Savings and Trust Company shall have execution thereof as at law.

By the court.

From the above decree the defendant prays an appeal to the Supreme Court of the United States in open court, which is allowed.

40 It is stipulated and agreed that this cause may be docketed in the Supreme Court of the United States and heard on the foregoing transcript, reserving, however, to the appellee the right, before the hearing, to add any other parts of the record below, certified by the clerk of the supreme court of the District of Columbia, without certiorari, and at appellant's expense.

ENOCH TOTTEN,
For Comm'r F. S. & Trust Co.
JNO. D. McPHERSON,
Sol'r for Appellant.

41 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together, under stipulation herein filed, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 18 day of October, 1879.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 18 day of Oct'r, 1879.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 18th day of October, 1879.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 110. Robert P. Dodge, appellant, vs. The Freedman's Savings and Trust Company. District of Columbia sup. court. Filed 20th October, 1879.